Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

RICHARD M. DONAHEY,
and PATRICIA A. DONAHEY,
Petitioners,

v.

SEABOURN S. LIVINGSTONE, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should a sole shareholder of a manufacturing corporation always escape personal liability for environmental contamination resulting from manufacturing operations (under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(a)) unless the "corporate veil" can be "pierced" pursuant to principles of state law?

PARTIES BELOW

The parties to the proceedings below are identified in the caption of the case, except for Respondent Helen L. Bogle against whom relief is not sought in connection with this Petition, and who has not joined in this Petition. Additional parties below include Defendants (1) St. Clair Rubber Company, a corporation whose charter expired in 1983 (A46) and which has no known parents or subsidiaries, and (2) H. Gordon Wood, an individual; neither of these parties was represented or active in connection with recent appellate procedures before the Court of Appeals for the Sixth Circuit, and neither has joined in this Petition to the Court.

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OPINIONS AND ORDERS BELOW

The en banc opinion of the Court of Appeals for the Sixth Circuit as rendered November 17, 1997, Donahey v. Bogle, ___ F.3d ___ (6th Cir. 1997), is included in the Appendix at A1. The Court of Appeals' Judgment dated November 17, 1997 is included at A20. The Court of Appeals' earlier opinion (Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1993)) is included at A22; the March 9, 1993 Judgment associated with that Opinion is included at A34. A June 15, 1993 Order of the Court of Appeals denying rehearing in connection with the earlier appellate panel decision is included at A36, and the Supreme Court's Order granting certiorari, vacating judgment and remanding the case, reported as Livingstone v. Donahey, 512 U.S. 1201 (1994) is included at A38. A copy of the trial court's Memorandum Opinion and Order is included at A39; the trial court's Order Modifying its October 1, 1991 Findings of Fact and Conclusions of Law is included at A88, and the trial court's Judgment, entered December 23, 1991 is included at A92.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and 28 U.S.C. 1651:

> **§ 1254. Courts of appeals; certiorari; appeal; certified questions**
>
> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or

after rendition of judgment or decree; . . ."

"§ 1651. Writs

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

The Court of Appeals' Judgment was issued November 17, 1997. This Petition is timely because it is filed "within ninety days after entry of the judgment." Rules of the Supreme Court, Rule 13.

STATUTES INVOLVED

The pertinent sections of CERCLA involved in this appeal are § 101(20)(A), 42 U.S.C. 9601(20)(A); § 107(a), 42 U.S.C. 9607(a); and § 113(b) and (f), 42 U.S.C. 9613(b) and (f). Their texts are set forth verbatim beginning in the Appendix at A97.

STATEMENT OF THE CASE

This is a case involving an individual's liability under CERCLA for environmental contamination resulting from the manufacturing operations of the individual's wholly-owned corporation. The question for review is the appropriate standard to be applied where that individual, Respondent Seabourn S. Livingstone, was the sole owner of all the

corporate stock and chairman of the corporation's board of directors. On December 12, 1997, the Court granted certiorari as to an opinion of the Court of Appeals for the Sixth Circuit which raises a comparable issue; namely, the standard to be applied to determine a parent corporation's liability for the environmental transgressions of its wholly-owned subsidiary. United States of America, Petitioner, v. CPC International, Inc.; Michigan Department of Environmental Quality, Petitioner, v. CPC International, Inc., et al, S. Ct. Docket Nos. 97-296 and 97-454 ("CPC").

This Petition seeks review of a Judgment of the Court of Appeals for the Sixth Circuit. That judgment stands alone among the circuits in declaring that an individual cannot be held liable, no matter how reprehensible his conduct,[1] unless the corporate veil can be pierced under state law principles. By contrast, the Second, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have each rejected defenses based on the claimed primacy of state corporate law, regarding individual shareholder liability.[2]

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[1] As Judge Ryan said in his concurring opinion below, the effect of the Sixth Circuit's "rather obvious misreading of CERCLA [is] to protect a 100% shareholder of an ostensible operator corporation from direct Section 107(1)(2)[sic; should probably say § 107(a)(2)] liability no matter what the evidence shows as to his activities." (A14, emphasis added.)

[2] New York v. Shore Realty, 759 F.2d 1032 (2d Cir. 1985); Schiavone v. Pearce, 79 F.3d 248, 255 (2d Cir. 1996); U.S. v. Carolina Transformer Co., 978 F.2d 832, 836-7 (4th Cir. 1992); Nurad, Inc. v. William E. Hooper & Sons, Inc., 966 F.2d 837 (4th Cir. 1992), cert. denied sub. nom., Mumaw v. Nurad, Inc., 506 U.S. 940, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992); Riverside Market Dev. Corp. v. International Building Products, Inc., 931 F.2d 327, 330 (5th Cir. 1991), cert. den., 502 U.S. 1004, 112 S.Ct.

The rejection of limited liability protection for individual shareholders, in these CERCLA cases, has largely resulted from the fact that CERCLA imposes liability not only on the "owner" of contaminated property but also, and separately, upon any "operator" of contaminated property (CERCLA § 107(a)(1) and (2)).[3] Separate categories of liable parties allow for imposition of liability without involving corporate veil piercing at all. As Chief Judge Boyce Martin stated, in his dissenting opinion below, "[t]here is no reason to discuss piercing the corporate veil when a 100 percent shareholder can be held directly liable as an operator under 42 U.S.C. § 9607(a)(2)." (A18.) Instead of "speaking in the wrong idiom" (id.) as the Sixth Circuit did, the Second, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits have adopted variations of what the Sixth Circuit itself said, in its first appellate decision in this case; specifically, "that [Respondent] Livingstone had the authority to prevent the contamination of the property by his corporation; thus, as a matter of law, Livingstone was a responsible party [under

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636, 116 L.Ed.2d 654 (1991); Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417 (7th Cir. 1994); United States v. TIC Investment Corp., 68 F.3d 1082 (8th Cir. 1995), cert den., ___ U.S. ___, 117 S.Ct. 50, 136 L.Ed.2d 14 (1996); Kaiser Aluminum v. Catellus Dev., 976 F.2d 1338, 1341 (9th Cir. 1992); Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1503-4 (11th Cir. 1996).

[3] There is in this case a third relevant category of liable "person," (apart from the corporate "owner" of the property), and that is "any person who ... otherwise arranged for disposal ..." of contaminants at property "owned ... by another party ...." CERCLA § 107(a)(3). Petitioners claimed at trial that Respondent Livingstone was liable under this CERCLA section as well, as Respondent Helen Bogle at all relevant times owned the contaminated property. (A43, A69.)

CERCLA]." A8-9, A28.

There is a different (but related) question, which has recently been accepted for review by this Court. (CPC, S.Ct. Docket Nos. 97-296 and 97-454.) That question is whether a parent corporation owning 100% of a subsidiary may be held liable for environmental contamination resulting from the subsidiary's activities. As argued later in this Petition, the case for a corporate parent's liability is less persuasive than that of the individual's liability for his wholly-owned corporation. Yet even as to this parent-subsidiary issue, the First, Second, Third, Eighth and Eleventh Circuits specifically reject the claim that the parent is liable only if the subsidiary's corporate veil may properly be pierced under state law.[4] The Sixth Circuit took the opposite view in CPC, which is consistent with its latest holding in this case of Donahey.[5]

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[4] John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993); United States v. Kayser-Roth Corp., 910 F.2d 24 (1st Cir. 1990), cert. den., 498 U.S. 1084, 111 S.Ct. 957, 112 L.Ed.2d 1045 (1991); Schiavone v. Pearce, 79 F.3d 248, 255 (2d Cir. 1996); Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1220-1225 (3d Cir. 1993); United States v. TIC Investment Corp., 68 F.3d 1082 (8th Cir. 1995); Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993).

[5] The Fifth Circuit requires veil piercing in the parent corporation context, and thus supports the respondents in CPC. Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80 (5th Cir. 1990), cert. den., 498 U.S. 1108, 111 S.Ct. 1017, 112 L.Ed.2d 1098 (1991). However, for good and sufficient reason the Fifth Circuit rejects veil-piercing as to individuals, thus impliedly rejecting the position of the CPC respondents and expressly supporting Petitioners in this case of Donahey. Riverside Market Dev. Corp. v. International Building Products, Inc., 931 F.2d 327, 330 (5th Cir. 1991), cert.

CPC may well have been wrongly decided. However, as a matter both of Michigan law and of analogous federal law,[6] a parent corporation never has the sort of authority over its subsidiary that Respondent Livingstone had over his wholly-owned corporation. Under Michigan law the board of directors governs the corporation.[7] Therefore, by law, the parent corporation does not govern the subsidiary's operation even if it does own 100% of the stock. By contrast, where an individual owns 100% of the corporate stock, the corporate board of directors is profoundly if not overwhelmingly influenced by the wishes of the only shareholder -- particularly if that shareholder is the Chairman of the Board, as Respondent Livingstone was.

In their complaint and at trial, Petitioners sought to establish that Respondent Livingstone "operated" the St. Clair Rubber Company "facility" "at the time of disposal of any hazardous substance" (CERCLA § 107(a)(2)), or that Livingstone "otherwise arranged for disposal" of St. Clair's manufacturing wastes (CERCLA § 107(a (3)).[8] Trial Court Opinion at A66.

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den., 502 U.S. 1004, 112 S.Ct. 636, 116 L.Ed.2d 645 (1991). This apparent dichotomy helps to demonstrate the differences between the parent-subsidiary question, and the stronger arguments for liability associated with the individual owner-wholly-owned corporation question.

[6] See, Section (B)(1) of this Petition, infra.

[7] Michigan Compiled Laws § 450.1501, Michigan Statutes Annotated § 21.200(501) provides, in pertinent part, that "[t]he business and affairs of a corporation shall be managed by or under the direction of its board [of directors], except as otherwise provided in this act or in its articles of incorporation."

[8] See Footnote 3.

A. Facts Established at Trial

The facts relating to Respondent Livingstone's liability or non-liability are not in dispute. Petitioners' complaint sought "contribution" (CERCLA § 113(f)) from defendants, including Mr. Livingstone, for response costs incurred by them in conducting clean-up operations on real property ("Site") purchased in 1981 by Petitioner Richard Donahey on land contract from Respondent Helen Bogle. (A45-6, A59.) Unknown to either Donahey or Bogle at the time of purchase was the existence of five subterranean pits containing concealed environmental contaminants resulting from operations by the tenant, St. Clair Rubber Company ("St. Clair"), which burned and buried its wastes over a period of more than twenty years at the Site. (A49, A65-66.)

In papers filed with the Court of Appeals, Respondent Livingstone himself asserted that at all applicable times, over two decades, he "was the sole shareholder and Chairman of the Board of St. Clair, hired the presidents and appointed the members of the board of the company" and that "the presidents reported directly to Mr. Livingstone [Respondent]."[9] Respondent Livingstone identified some chemical solvents by name which were used in St. Clair's manufacturing operations, but declared that he was "not a chemist"[10] Admittedly Mr. Livingstone had "hired various presidents over a period of years" to oversee manufacturing operations.[11] But St. Clair's long time secretary and attorney

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[9] See Respondent Livingstone's June 29, 1992 Brief to the Court of Appeals, at pp. 28-9; transcript of proceedings, May 6, 1991, Livingstone Tr. 74-5; A46.

[10] May 6, 1991 transcript, Livingstone Tr. 90-91.

[11] May 3, 1991 transcript, Wood Tr. 35.

(a partner then recently retired from a large Detroit law firm) testified that "Mr. Livingstone ran the company [St. Clair] as a sole proprietorship," and "absolutely" had ultimate decision-making authority at the company. The attorney further testified "it [St. Clair] was a corporation but he [Livingstone] ran it as his business. And actually he could hire and fire people as he saw fit as chairman .... Mr. Livingstone said he [the president] couldn't fire anybody without his approval."[12]

At trial, Livingstone testified that all operational people "reported to whoever the president was in Marysville."[13] Livingstone denied having any knowledge of any waste disposal at the Site or at St. Clair's other manufacturing facility (also in Marysville, Michigan), declaring "I don't want to hear about that sort of thing" when asked if he was told that the City of Marysville had informed St. Clair that it could no longer burn wastes behind this other facility.[14] Dumping, burning, and the City of Marysville's demands that these practices be halted are at the core of the Site's environmental problems. (A4, A45)

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[12] As quoted in Respondent Livingstone's own Brief to the Court of Appeals, June 29, 1992, at p. 28; also see May 3, 1991 transcript, Wood Tr. 89, 93-4.

[13] May 6, 1991 transcript, Livingstone Tr. 76.

[14] May 3, 1991 transcript, Livingstone Tr. 77-8. His full statement on the point (also quoted in fuller detail by Respondent Livingstone's own Brief to the Court of Appeals, November 10, 1995, at pp. 12-13) was this: "I would frankly probably dress him [the company president] down for [telling me] that [information about burning wastes] because I don't want to hear about that sort of thing."

The trial court exonerated Livingstone from having "personally participated in the waste disposal practices of St. Clair." (A67) However, the trial court specifically found "that Livingstone had the authority to control waste disposal practices [but] he never exercised such authority; it was delegated to others." The court also found "no evidence that Livingstone personally arranged for the disposal of St. Clair's industrial waste products." (A67-68)

B. Appellate Court Decisions

In the first (1993) appeal, the Sixth Circuit reversed the trial court's finding of non-liability on the part of Mr. Livingstone, declaring that "the evidence clearly established that Livingstone had the authority to prevent the contamination of the property by his corporation; thus, as a matter of law, Livingstone was a responsible party." (A28) That panel decision affirmed the trial court's conclusion that no "response costs" would be awarded to Plaintiffs, but reversed that part of the trial court's decision which failed to award to Plaintiffs their "initial investigative" costs and appropriate attorney fees. Livingstone thereafter petitioned this Court for certiorari both on the issue of his own liability, and on the issue of attorney fees. This Court granted certiorari and vacated the Sixth Circuit panel's earlier decision, inviting "further consideration in light of Key Tronic Corp. v. United States, 511 U.S. 809 (1994)."[15] The Sixth Circuit thereafter heard the matter en banc and as a result, reinstated and reaffirmed [its earlier decision] except

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[15] Key Tronic involved private-party attorney fees; it did not involve any issue of CERCLA liability for sole shareholders of corporations, whether individual sole shareholders or corporate sole shareholders.

as to attorney's fees and § 107(a)(2) operator liability." (A14, A21)

This Petition therefore presents for review the Sixth Circuit's most recent pronouncement as to "§ 107(a)(2) operator liability." It also presents for review the issue of Livingstone's § 107(a)(3) "arranger" liability, which was denied by the trial court and as to which each of the Sixth Circuit opinions has been silent. Finally, this Petition is presented in the context of Petitioners' having been awarded their "investigative costs" in the earlier Sixth Circuit panel opinion, as reinstated and reaffirmed by the Sixth Circuit in its recent November 17, 1997 judgment. (A14, A31-33)

REASONS FOR GRANTING THE WRIT

A. The Decision Of The Court Of Appeals For The Sixth Circuit Is In Conflict With Decisions By The Courts Of Appeals For The Second, Fourth, Fifth, Seventh, Eighth, Ninth And Eleventh Circuits, On The Same Important Matter

1. Second, Eighth, Fourth and Ninth Circuit Decisions

Where individual CERCLA liability is concerned, no other federal circuit adopts the view that limited shareholder liability, established under state law, also insulates individuals from liability under CERCLA. Instead, every federal circuit having occasion to address the issue has rejected the immunities and protections of limited liability, in favor of a finding of "operator" or "arranger" liability under CERCLA, § 107(a)(2) or (3). In the seminal case of New York v. Shore Realty, 759 F.2d 1032 (2d Cir. 1985), the appellate court applied § 107(a) (2) "operator" liability to the president and sole shareholder of a corporation owning contaminated

property, finding that the individual "is in charge of the operation of the facility in question, and as such is an 'operator' within the meaning of CERCLA." 759 F.2d at 1052. The court reached this conclusion even though stating that "it is debatable whether a New York court would hold LeoGrande personally liable by piercing the corporate veil." Id. at 1052.[16]

The Second Circuit recently carried forward on these pronouncements in Schiavone v. Pearce, 79 F.3d 248, 255 (2d Cir. 1996):

> Although we are not unmindful of the weighty concerns [favoring "an alternative approach that strictly adheres to traditional veil-piercing concepts"] expressed by the Fifth and Sixth Circuits, we subscribe instead to the views adopted by the First, see, e.g., ; Kayser-Roth, 910 F.2d 24; Third, see, e.g., [United States v.] USX Corp., 68 F.3d 811 [3rd Cir. 1995)]; FMC Corp. [v. United States], 29 F.3d 833 [3rd Cir. (1994)]; Lansford-Coaldale, 4 F.3d 1209; Fourth, see, e.g., Carolina Transformer, 978 F.2d 832 (independent, personal operator liability for corporate principals); Seventh, see, e.g., Sidney S.

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[16] Shore Realty also concluded "that an owning stockholder who manages the corporation" would be liable because of the specific exception from liability of "a person, who, without participating in the management of a ... facility, holds indicia of ownership primarily to protect his security interest in the facility." Id. at 1052; CERCLA § 101(20(A). Chief Judge Boyce Martin, dissenting in this case of Donahey, made the same point in concluding that "the explicit exclusion of one class of shareholders," on the one hand, from managing, "100 percent" shareholders, on the other, augured for liability on the part of such an "owning stockholder who manages the corporation..." (A17)

> Arst, 25 F.3d 417 (direct operator liability for corporate officers and directors); Eighth, see, e.g., TIC Inv. Corp., 68 F.3d 1082; and Eleventh Circuits, see, e.g., Jacksonville Elec., 996 F.2d 1107; and of several district courts within this circuit, see, e.g., [New York v.] Solvent Chem., 875 F. Supp. 1015 [W..D.N.Y. (1995)]; [City of New York v.] Exxon, 112 B.R. 540 [S.D.N.Y. (1990)]. A recognition of direct operator liability for parent corporations is both compatible with the statutory language and consistent with CERCLA's broad remedial scheme.[17]

A recent Eighth Circuit decision upheld a summary judgment of individual CERCLA liability, and decried any rule of law that would allow "a corporate officer, who has virtually unlimited control over a company and in fact exercises that control but knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices, ... [to] avoid CERCLA liability ..." United States v. TIC Investment Corp., 68 F.3d 1082, 1089 (8th Cir. 1995) cert. den. __ US __, 117 S.Ct. 50 (1996). The TIC court grappled directly with the issue that Respondent Livingstone has most adamantly advanced at trial and in the Court of Appeals; namely, if Mr. Livingstone played no direct, hands-on role with his company's wastes, he should

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[17] Although Schiavone itself involved a parent-subsidiary situation, the authority cited approvingly by that court included several individual shareholder-wholly owned corporation cases. Schiavone has subsequently been cited by district courts in the Second Circuit in cases involving corporate directors and majority shareholders. See, Idylwoods Associates v. Mader Capital, Inc., 956 F. Supp. 410, 413 (W.D.N.Y. 1997).

have no liability.[18]

Before TIC was decided in late 1995, Respondent Livingstone had cited and principally relied on an earlier Eighth Circuit decision, U.S. v. Gurley, 43 F.3d 1188 (8th Cir. 1994). Gurley among other things had declared that an individual would not be liable for corporate environmental misdeeds unless that person "actually exercised" his authority to determine whether and how hazardous materials would be disposed of (43 F.3d 1188, 1193). The TIC court declared, however, that its earlier decision in Gurley was distinguishable because the individual in that case "was a non-officer,[19] non-director, non-shareholder employee" and that "language from Gurley" could not be taken "out of context to conclude that Georgoulis cannot be personally liable ... absent proof of his personal involvement in the arrangement for disposal ..." 68 F.3d at 1088-9.[20]

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[18] Until mid-summer 1995, when the first CPC decision was rendered (sub. nom. U.S. v. Cordova Chemical Co. of Michigan, 59 F.3d 584 (6th Cir. 1995)), Livingstone based his arguments only peripherally on limited liability under state corporate law. His principal argument was always based on his claim that, except for exercising his personal right to hire and fire all corporate personnel, he delegated all operational responsibilities at his company.

[19] Livingstone was also, at all applicable times, Treasurer of St. Clair Rubber Company. May 6, 1991 transcript, Livingstone Tr. 74-75.

[20] The appellate court had assumed, in keeping with the requirements for review of a summary judgment allegedly involving undisputed facts, that "neither Georgoulis nor any employee of the TIC entities [which Georgoulis owned] had personal knowledge of the contract ... for the disposal," and that

Therefore, when squarely presented with the issue (and even in a summary judgment setting) the Eighth Circuit had no hesitation in rejecting the claim that "actual exercise" of authority by the individual was essential to a finding of liability. The Fourth and Ninth Circuits have also exactly so held. See, U.S. v. Carolina Transformer Co., 978 F.2d, 832, 836-7 (4th Cir. 1992), reiterating an "authority to control" standard adopted in Nurad, Inc. v. William E. Hooper & Sons, Inc., 966 F.2d 837 (4th Cir. 1992), cert. denied, ___

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neither he nor any relevant employee had "any personal knowledge of the disposal practices at the dump site, or was in any way directly involved in waste disposal matters." 68 F.3d at 1084. However, it should also be noted that the liability issue in TIC was whether Georgoulis and other defendants were "arrangers for disposal" under CERCLA § 107(a)(2). The applicability of TIC's reasoning to the circumstances of Respondent Livingstone's liability should not be thereby diminished; in fact, the TIC court was at pains to point out that arranger liability was more difficult to establish because "operator liability, by contrast, merely requires that one operate the facility at which hazardous substances are disposed of, at the time of the disposal; it does not require any involvement in the disposal activities themselves." 68 F.3d at 1090, footnote 7. Nor did the TIC court disagree with the trial court's conclusion that the standards for judging arranger and operator liability were the same. Id. at 1086. The court also specifically noted that Georgoulis' "level of control" would have been sufficient to impose operator liability if disposal in that case had not been on land owned and operated by a third party. Id. at 1089, footnote 6. In any event, on the clear authority of TIC Petitioners respectfully suggest Livingstone's "arranger" liability should also be established. (The trial court concluded that Livingstone was not liable as an "arranger" or an operator (A66-68) and both the Panel's Opinion at 987 F.2d 1250, and the November 17, 1997 en banc decision, are silent on the "arranger" issue.)

U.S. ___, 113 S.Ct. 377 (1992), and Kaiser Aluminum v. Catellus Dev., 976 F.2d 1338, 1341 (9th Cir. 1992) (adopting "authority to control" standard).

Like Respondent in this case, the involved individual in TIC asserted that he knew nothing of his company's waste disposal practices. Also like Respondent, Mr. Georgoulis of TIC was the sole shareholder and chairman of the board who hired and fired several persons as president within a few years' time. Both avoided any responsibility for waste handling, yet Respondent Livingstone (in contrast to the reported record involving Mr. Georgoulis) specifically knew by name some of the exotic solvents which were used in the manufacturing process by his company.[21] Moreover, Respondent's protest that he was "not a chemist" does not gainsay his certain knowledge that chemists were necessary for manufacturing operations.

The trial court did of course find that Livingstone had no direct supervision or active participation in waste disposal practices. But this is a finding of result, in contrast to TIC's emphasis on cause: "... clos[ing] his .... eyes to the specific details of the company's hazardous waste disposal practices ..." The issue with Respondent is not so much how he acted as how he failed to act, how he neglected his responsibilities by adopting what Judge Martin would describe as a "'don't ask, don't tell' policy regarding the disposal of environmental

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[21] See, e.g., May 6, 1991 transcript, Livingstone Tr. 91, where Respondent Livingstone referred to "MEK" (but he was not able to confirm "methylethylketone" as what "MEK" meant); and "toluwal (sp.)" where "somebody said it was a carcinogen or something like that." Respondent Livingstone's only expressed concern with respect to these solvents was "when the price of things went up ..." Id.

toxins."[22]

Petitioners will urge this Court to conclude, as did the Sixth Circuit Panel hearing the case in 1993, that any 100% shareholder and Chairman of the Board who would declare "I don't want to hear about that sort of thing" with respect to a violation of municipal waste burning laws, should be held accountable for his corporation's environmental wrongs.

2. Fifth, Seventh and Eleventh Circuit Decisions

As mentioned above, only the Sixth Circuit declares that state corporate law trumps federal environmental law (in the form of CERCLA) when it comes to individual liability for corporate misdeeds. The other seven Circuits who have addressed the issue have found § 107(a)(2) "operator" liability or § 107(a)(3) "arranger" liability, separately, without feeling hidebound by state corporate law principles.

Subpart A(1) of this argument points out that the Fourth, Eighth and Ninth Circuits have unequivocally adopted the "authority to control" test for personal liability. Shore Realty and Schiavone suggest that the Second Circuit may also yet take that position, in an appropriate case.[23]

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[22] A15-16. (The Chief Judge for the Sixth Circuit, Boyce F. Martin, dissenting from the majority decision below). In context, Judge Martin first stated that "the majority opinion not only creates new law, but also offers novel opportunities for the savvy polluter." He went on to describe the savvy polluter in part as one who "can play an active role in the company but follow a 'don't ask, don't tell' policy regarding the disposal of environmental toxins."

[23] But see, Certain Underwriters at Lloyd's v. St. Joe Minerals, 90 F.3d 671, 674 (2d. Cir. 1996), in which the court stated, in dicta, that "it is debatable whether this Court is prepared to go that far"

Cases decided to date in the Fifth, Seventh and Eleventh Circuits have, on their facts, been more akin to Gurley than to TIC. Therefore, each of the three decided cases in these three circuits has spoken in terms of "actual participation or control" as the test of liability. See, Riverside Market Dev. Corp. v. International Building Products, Inc., 931 F.2d 327, 330 (5th Cir. 1991) (the challenged individual held 85% of the corporate stock with the other 15% held by the president and chief executive officer who was on-site while the challenged individual, who was "secretary of the corporation, consultant and chairman of the board ... lived in New York and visited the New Orleans facility only 2-4 times a year" principally for sales purposes in conjunction with his "consulting activities" [at 328]); Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417 (7th Cir. 1994) (the affected individuals were two defendants, the president, majority shareholder and director, on the one hand, and the vice president, on the other; each of these defendants, in a motion to dismiss situation, had been alleged in the complaint filed against them to have "knowingly exercised direct and personal control" [at 421] involving waste contaminants; the complaint was reinstated by the Court of Appeals); Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1505 (11th Cir. 1996) (individuals were limited partners who had "rights [never exercised] under the partnership agreement to control the partnership's affairs" [at 1505]).

Just as the Eighth Circuit refused to apply its own Gurley test to a TIC situation, there is no reason to believe that the Fifth, Seventh and Eleventh Circuits would not themselves apply an "authority to control" test in a proper case. Once again, Chief Judge Boyce Martin's comments are

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in finding "mere authority to control" sufficient to impose liability.

instructive. In dissent, he said:

> Federal-state issues aside, this case is not about imposing liability on the average shareholder. In discussing 'shareholder' liability in this context, I limit my comments specifically to sole shareholders who are active in the corporation. I reserve the question of the liability of people who own less than 100 percent of a corporation's shares or who are not active in management.

(A16-17)

Here, Respondent Livingstone owned 100% of the shares of his corporation, and was active in its management, and is thus a clear candidate for liability, under any test except that articulated by the Sixth Circuit.

B. The Decision of the Court Of Appeals For The Sixth Circuit Resolves An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court

1. This Court Has Imposed Responsibility On The Individual Employee For Important Public Health Concerns Resulting From Corporate Operations

In cases decided under the Federal Food, Drug and Cosmetic Act, this Court has not hesitated to impose individual liability where important matters of public health

were concerned.[24] In U.S. v. Park, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975), the individual's defense to food contamination charges brought against both him and his corporate employer was that sanitary conditions at the corporate food warehouses had been assigned to "dependable subordinates." Id. 421 U.S. at 664. The court, looking again "to the purposes of the act," rejected the requirement, set by the Court of Appeals for the Fourth Circuit below, that "wrongful action" on the part of the individual must be proved. Id. at 668, 673. Instead, once the Government showed that the individual "by reason of his position in the corporation, [has] responsibility and authority to prevent in the first instance, or promptly to correct, the violation [of the Act] complained of, and that he failed to do so," the individual would be left primarily with the defense that he or she "was 'powerless' to prevent or correct the violation ...." Id. at 673-4, 673.

The purposes of the Federal Food, Drug and Cosmetic Act parallel those of CERCLA. The former protects "the public interest in the purity of its food,"[25] while the latter concerns itself e.g. with "substances which, when released into the environment may present substantial danger to the public health or welfare or the environment ..." (CERCLA § 102(a)), or "any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare ..." (CERCLA § 104(a)(1)). CERCLA also seeks to make "those responsible for disposal of chemical poisons bear

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[24] CERCLA is contained within Title 42 of the United States Code, entitled "The Public Health and Welfare;" the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, et seq., is contained within Title 21: "Food and Drugs."

[25] Park, 421 US at 671, citing Smith v. California, 361 U.S. 147, 152 (1959).

the cost and responsibility for remedying the harmful conditions they created." Anspec Co. v. Johnson Controls, Inc., 992 F.2d 1240, 1247 (6th Cir. 1991). The proofs in Park showed that the individual (who was chairman of the corporate board) sought to delegate the contamination matter to "dependable subordinates;" by contrast, Respondent Livingstone said "I don't want to hear about that sort of thing" and busied himself with the cost of the potentially-contaminating solvents rather than their proper disposal. The defendant in Park could escape liability only by showing that he was "powerless;" Respondent Livingstone, pursuant to the decision below, escapes liability notwithstanding his "sole proprietorship" power because, under Michigan law, the corporate veil cannot be pierced. It is anomalous to impose criminal sanctions on individuals responsible for corporate misdeeds affecting public health; and yet, in the civil context (where due process is not even an issue) absolve the 100% shareholder of his wholly-owned corporation from any public health responsibility whatever.

In the Federal Food, Drug and Cosmetic Act context, the Court has imposed individual liability even in cases where the responsible individual was regarded as relatively innocent. See, U.S. v. Dotterweich, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943) ("In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."). Respondent Livingstone fobs off ignorance as innocence. Yet the consequences of the studiously-ignored activities of his wholly-owned company, St. Clair Rubber Company, are grave indeed. On the record below they involve substantial costs for clean up, subterranean pits hidden from view until heavy equipment began to sink into the earth, and public health issues, including the public water drinking supply. (A6 - footnote 2, A7, including footnote 3, A41, A43) Petitioners submit that Respondent Livingstone

should be held to no less a standard than defendants Park and Dotterweich.

The point of individual responsibility is exemplified by decisional authority from the Court of Appeals for the Fifth Circuit, on the very point at issue in this case. In Joslyn Mfg. Co. v. T. L. James & Co., 893 F.2d 90 (5th Cir. 1990), cert. den., 498 U.S. 1108 (1991), the Fifth Circuit held that a parent corporation would not be liable for its subsidiary's CERCLA transgressions unless the subsidiary's corporate veil could be pierced under state (Louisiana) law. A year later, the same Circuit decided Riverside Market, which was another Louisiana case but involving, this time, an individual owning 85% of the stock. Without citing Joslyn, the Riverside Market court stated that "the issue presented for our review may be stated as whether or not Prescott, a majority shareholder and officer of IBP, may be held personally liable for clean up costs as owner or operator of the asbestos manufacturing facility under Section 9607(a) of CERCLA." 931 F.2d at 329. Even though no liability was found, the court said "... we can conceive of situations where an individual director, officer, or employee of a corporation may be considered an 'operator' of a manufacturing facility as defined by CERCLA... " Id. at 330.

Petitioners submit that Joslyn and Riverside Market can be reconciled and that, as reconciled, they point up the singular importance of individual responsibility where matters of public health are concerned. The court in Riverside Market referred to "the principle of limited liability" under corporate law, but declared that "CERCLA prevents individuals from hiding behind the corporate shield when, as 'operators,' they themselves actually participate in the wrongful conduct prohibited by the Act." Id. at 330. It seems clear enough that the individual participant, particularly one who is a 100% shareholder and active chairman of the board of directors of the corporation, sets the moral tone for

the corporation in a way that a parent corporation, vis-a-vis its subsidiary, rarely if ever could.

2. This Court Has Upheld Federal Legislative Policies Despite Contrary State Corporate Law Requirements

As Chief Judge Boyce Martin pointed out in dissent in Donahey,

> A corporation is a product of state law. As such it should not provide a shield behind which an individual can flaunt federal law. "[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630 (1983). One of the legislative policies behind CERCLA is to make "those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created." Anspec Co. v. Johnson Controls, Inc., 992 F.2d 1240, 1247 (6th Cir. 1991). The en banc majority allows Livingstone to misuse a state creation, a corporation, to circumvent a federal policy. (A16)

In Bangor Punta Operations, Inc., et al v. Bangor & Aroostook Railroad Co., et al, 417 U.S. 703 (1974), the Court of Appeals for the First Circuit had sustained the right of respondent corporations to maintain a lawsuit against petitioners where the more-than-99% corporate shareholder of the plaintiffs-respondents would have been barred from bringing such a suit. The court had no difficulty in reversing, saying, at 713:

> Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 442 (1934); Chicago, M. & St. P. R. Co. v. Minneapolis Civic Assn., 247 U.S. 490, 501 (1918). In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form. Thus, where equity would preclude the shareholders from maintaining an action in their own right, the corporation would also be precluded. (Case citations omitted).

This case of Donahey presents the reverse of Bangor Punta; the St. Clair Corporation is liable but the 100% shareholder is not. Respondent Livingstone's culpability of course has been amply demonstrated. Yet culpability has not equated to liability, because of the Sixth Circuit's misapplication of concepts of limited liability under state corporate law. Petitioners urge the Court to accept this Petition because, below, "the corporate form ... [has been] used to defeat an overriding public policy."

CONCLUSION

"CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. We are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes. ... With this in mind, we join the Second Circuit in proclaiming that '[w]e will not interpret § 9607(a) in any way that apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise.' New

York v. Shore Realty Corp., 759 F.2d 1032, 1045 (2d. Cir. 1985)." Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st. Cir. 1986). Numerous other courts of appeals and district courts have expressed identical sentiments, both in governmental and (as with Dedham Water) private party enforcement proceedings. They have also frequently cited the early case of United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982): "... Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." To the same effect, see Schiavone, 79 F.2d at 2[illegible] and cases cited.

As this Petition has tried to point out, there are many reasons to conclude that the Sixth Circuit decision of Donahey v. Bogle has compromised the congressional goals as expressed through CERCLA.

1. Donahey v. Bogle is in conflict with the decisional authority of seven other Circuit Courts of Appeals.

2. The Sixth Circuit decision exalts state corporate law over established federal policy. "'[T]he court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies.'" First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 630 (1983)." Chief Judge Boyce Martin, in dissent, at A16.

3. CERCLA itself separately provides for the liabilities of the "owner" of contaminated property, the "operator" of contaminated property, and persons who "otherwise arranged for disposal" of contaminants on contaminated property. CERCLA § 107(a)(2) and (3). Thus, CERCLA does not itself compel challenge to corporate veil piercing requirements of state law; to conclude that it does is akin to "speaking in the wrong idiom." Chief Judge Martin,

in dissent, at A18.

4. Furthermore, because "CERCLA specifically excludes shareholders who are not involved in the management of companies from the definition of 'owners' and 'operators,' CERCLA thereby itself "'implies that an owning stockholder who manages the corporation ... is liable under CERCLA....'" Chief Judge Martin, in dissent, quoting (in part) Shore Realty, at A17.

5. The 100% shareholder's relationship to the environmental transgressions of his wholly-owned corporation presents a stronger case for liability than the parent-subsidiary situation, for two reasons.

a. Michigan state law commands governance of a corporation by its board of directions; the individual owner is the corporation in ways that a parent corporation could never be in fact or by law.

b. Cases decided under a comparable public health statute, the Federal Food, Drug and Cosmetic Act, have not hesitated to impose individual criminal liability in appropriate cases. See, U.S. v. Dotterweich, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943) and U.S. v. Park, 421 U.S. 658, 673-4, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975).

6. None of the seven Circuits finding individual shareholder liability have demanded that actual control be shown (as opposed to "authority to control") in any case involving a 100% shareholder and chairman of the board who actively participated in management. "Simply ignoring environmental misdeeds ... should not be a way of avoiding CERCLA liability." (A17)

As Chief Judge Martin said in dissent, the Donahey v. Bogle "majority has turned a blind eye to congressional intent." App. A at A15. This Court should grant Petitioners' request for a writ of certiorari.

Respectfully submitted,

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/s/_____

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Dated: January ___, 1998

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0335P
(6th Cir.)
File Name: 97a0335p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD M. DONAHEY; PATRICIA A. DONAHEY, *Plaintiffs-Appellants/ Cross-Appellees,*	)	Nos. 92-1128/1151
v.	)	
HELEN L. BOGLE, *Defendant-Appellee/ Cross-Appellant,*	)	
SEABOURN S. LIVINGSTONE; H. GORDON WOOD; ST. CLAIR RUBBER COMPANY, *Defendants-Appellees.*	)	

Donahey, et al. v. Bogle, et al.
92-1128

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 87-74771--Lawrence P. Zatkoff, District Judge.

Argued: December 6, 1995

Decided and Filed: November 17, 1997

Before: MARTIN, Chief Judge; MERRITT, KENNEDY, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, and MOORE, Circuit Judges.

COUNSEL

ARGUED: H. G. Sparrow, III, DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN, for Appellants. Mark A. Goldsmith, HONIGMAN, MILLER, SCHWARTZ & COHN, Detroit, Michigan, Henry N. Carnaby, BODMAN, LONGLEY & DAHLING, Troy, Michigan, for Appellees. **ON BRIEF:** H. G. Sparrow, III, DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN, for Appellants. Mark A. Goldsmith, Jay E. Brant, Daniel G. Helton, HONIGMAN, MILLER, SCHWARTZ & COHN, Detroit, Michigan, Henry N. Carnaby, BODMAN, LONGLEY & DAHLING, Troy, Michigan, Louise A. Marcotry, BODMAN, LONG & DAHLING, Detroit, Michigan, for Appellees. M. Alice Thurston, U.S. DEPARTMENT OF JUSTICE, LAND & NATURAL RESOURCES DIVISION, Washington, D.C., Anne S. Almy, U.S. DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

NORRIS, J., delivered the opinion of the court, in which MERRITT, KENNEDY, MILBURN, NELSON, BOGGS, SILER, and BATCHELDER, JJ., joined. RYAN, J. (p. 13), delivered a separate concurring opinion, in which MOORE, J., joined. MARTIN, C. J. (pp. 14-17), delivered a separate dissenting opinion, in which DAUGHTREY, J., joined.

OPINION

ALAN E. NORRIS, Circuit Judge. Like so many actions brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), this case illustrates the difficulties that often attend the apportionment of financial liability for the environmental damage done to an industrial site. Sitting en banc, this court recently held that, under CERCLA, a parent corporation is liable for the environmental harms done by its subsidiary only if the elements necessary to pierce the corporate veil are present. *United States v. Cordova Chem. Co. of Michigan,* 113 F.3d 572, 579-80 (6th Cir. 1997) For the reasons outlined below, we conclude that the same standard applies to a 100% shareholder of a corporation.

This case involves an industrial site located in Marysville, Michigan. On October 31, 1962, defendant Helen L. Bogle acquired title to the property. That same day she entered into a ten-year lease with the St. Clair Rubber Company, also a named defendant. At its expiration, the lease was renewed for a second ten-year term.

In its post-trial Memorandum Opinion and Order filed October 1, 1991, the district court made extensive findings of fact, including the following description of the use to which

St. Clair put the property in question:

> St. Clair's manufacturing processes utilized various organic compounds, including aromatic compounds such as, but not limited to, methyl-ethyl-ketone ("MEK"), benzene, xylene, hexane, toluene and various other compounds such as resins and rubber raw materials.
>
> . . . . .
>
> One of St. Clair's manufacturing processes involved the blending of resins, solvents ... and other raw materials to produce various rubber products and adhesives ....
>
> The blending process left a waste product on the churns that St. Clair removed by treating the churns with additional solvent. The waste product combined with the additional solvent, and the resulting "sludge" was drained off into 55 gallon drums ....
>
> . . . . .
>
> Typically, St. Clair employees transported 12 to 20 barrels or drums of sludge from the adhesive plant to the property every six month[s] for disposal. The employees allowed the sludge to drain from the barrels for approximately one week, after which they returned to bum the sludge. At the behest of the City of Marysville, St. Clair stopped its dumping and burning at the property in the 1970s.

Mem. Op. at 4-5. In short, the district court concluded that this and other manufacturing activities conducted by St. Clair resulted in significant environmental harm to the property.

Throughout the time period relevant to this case, Bogle's brother, defendant Seabourn S. Livingstone, owned 100% of St. Clair's stock. He also served as chairman of the board of directors and as treasurer. With respect to his direct involvement in the pollution caused by St. Clair, however, the district court made the following factual finding:

> [T]here is no credible evidence that Livingstone personally participated in the waste disposal practices of St. Clair. No witness testified that Livingstone gave explicit or implicit instructions to dispose of wastes in a specific manner. The testimony at trial clearly indicated that Livingstone personally participated in only the financial aspects of St. Clair's operations, and that the day to day affairs, including waste disposal practices, were handled by managers and supervisors who did not need approval from Livingstone to execute their duties. While it is true that Livingstone had the authority to control waste disposal practices, he never exercised such authority; it was delegated to others ....
>
> There is also no evidence that Livingstone personally arranged for the disposal of St. Clair's industrial waste products.

Mem. Op. at 28-29 (footnote omitted).

In the fall of 1981, plaintiff Richard Donahey considered purchasing the property because it was situated near the manufacturing facility of Daca Manufacturing, Incorporated, a company in which he had an interest. Donahey inspected the property and, based upon his own

experience in manufacturing, recognized that it contained a dump. Before entering into a land contract with Bogle, therefore, Donahey first negotiated an agreement with St. Clair in which the former tenant consented to restore the property to an environmentally satisfactory condition. St. Clair also agree to indemnify Donahey for costs resulting from any dumping on the part of the company.[1]

On January 6, 1982, Donahey purchased the property, from Bogle for $115,000, putting $28,750 down and agreeing to pay the remainder in monthly installments at 11% interest. Donahey deeded the property to himself and to his wife, plaintiff Patricia Donahey, on January 28. They then leased the site to Daca Manufacturing.

Not long after acquiring the property, Donahey had reason to question his purchase. First, former St. Clair employees detailed the extent of the company's disposal practices to the Michigan Department of Natural Resources ("MDNR"). Then, in 1985, a newspaper article described the pollution of the property.[2] Finally, on April 28, 1986, the MDNR informed the Donaheys that they were required, as its

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[1] The value of this agreement was of limited duration. As the district court found, "St. Clair's Michigan Annual Reports for Profit Corporations for the period spanning 1979-1983 repeatedly and consistently indicate that its term of existence was to expire on March 18, 1983. In the early 1980s, St. Clair Rubber dissolved and ceased to exist as a corporation." Mem. Op. at 7-8.

[2] Although all environmental degradation is arguably a matter of public concern, the pollution present at this particular property was of particular interest because of its proximity to the local water supply.

owners, to undertake an environmental evaluation of the property.

Richard Donahey responded to these developments by hiring Lawrence Halfen, an environmental consultant, to devise a remediation plan. Halfen proposed and carried out a plan at a cost of between $30,000 and $35,000. While overseeing the clean-up, however, Halfen noticed additional problems in the form of a "swath of gelatinous material." When the ground began to sink under the weight of a backhoe, further investigation revealed buried pits ranging from six to ten feet in depth. He undertook additional efforts at remediation in light of this discovery. However, this initial effort was a temporary solution at best. Consequently, Halfen proposed a second plan in late 1987 with an estimated price-tag of $450,000.[3]

Given the fact that release of solvents into the soil occurred before his ownership,[4] Donahey understandably sought a contribution for the clean-up from the previous owner, Bogle. To that end, he notified her on August 2, 1987, that future payments on the land contract would be placed in escrow. For her part, Bogle informed plaintiffs that she was accelerating the payments due under the land contract.

In a clear demonstration of how the value of the property had plummeted as the extent of the environmental damage became clear, plaintiffs attempted to surrender their

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[3] The current cost of such a plan is approximately $1,000,000.

[4] The district court made an explicit finding on this point. Mem. Op. at 9.

interest in the property in August of 1990 by tendering quitclaim deeds to Bogle, an overture that she refused. Shortly thereafter, Richard Donahey ceased making payments on the land contract all together and effectively abandoned the property.

The Donaheys filed an eleven-count complaint on November 6, 1987, which included a CERCLA claim and also sought to rescind the land contract. Bogle responded by filing a counterclaim, as well as a cross-claim against St. Clair and her brother, Seabourn Livingstone. The district court conducted a bench trial in 1991, and issued the Memorandum Opinion and Order cited above on October 1, 1991.

Among other things, the district court held that 1) none of the parties had incurred any recoverable response costs under CERCLA; 2) Richard Donahey is the current owner of the property; 3) Richard Donahey is obliged to perform specifically the land contract within ten days of judgment, including pre- and post-judgment interest; and, 4) Seabourn Livingstone was not a responsible party as defined by CERCLA because he took no active role in St. Clair's environmental activities.

On appeal, this court affirmed in part and reversed in part. *Donahey v. Bogle,* 987 F.2d 1250 (6th Cir. 1993). We agreed that Bogle could demand specific performance despite plaintiffs' argument that they were entitled to rescind the land contract because the environmental contamination constituted an encumbrance that prevented transfer of clear title to the property. *Id.* at 1254.

With respect to the CERCLA issues, however, we reasoned that, "the [trial] court erred in concluding that Seabourn Livingstone was not liable as an owner under CERCLA. The evidence clearly established that Livingstone

had the authority to prevent the contamination of the property by his corporation; thus, as a matter of law, Livingstone was a responsible party."[5] Id.

Finally, this court granted plaintiffs' request for attorney's fees and response costs and remanded the matter to the district court for determination of the appropriate amount due plaintiffs. *Id.* at 1255-56.

The Supreme Court subsequently granted certiorari in light *of Key Tronic Corp. v. United States,* 511 U.S. 809 (1994), a case holding that attorney's fees were generally not recoverable as response costs under CERCLA. The Court vacated our earlier judgment and remanded the case for further consideration of the attorney's fees issue. *Livingstone v. Donahey,* 512 U.S. 1201 (1994).

II.

Before the trial court, plaintiffs sought an award of $279,000 for attorney's fees incurred as necessary expenses in their attempt to clean up the property. Reversing the trial court, this court adopted the reasoning of *Bolin v. Cessna Aircraft Co.,* 759 F. Supp. 692 (D. Kan. 1991), for the proposition that attorney's fees were recoverable by private parties under § 107 of CERCLA. *Donahey v. Bogle,* 987 F.2d at 1256.

In *Key Tronic,* the Supreme Court explicitly considered whether attorney's fees are "necessary costs of

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[5] Although the opinion refers to Livingstone's liability as an owner, it is clear from the discussion that liability was premised upon his status as an "operator." 42 U.S.C. § 9607(a)(2).

response" within the meaning of § 107(a)(4)(B) of CERCLA, which would make them recoverable. *Key Tronic*, 511 U.S. at 811. The Court concluded that "CERCLA § 107 does not provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action." *Id.* at 819. However, the Court did not absolutely rule out recovery of some fees paid to attorneys:

> The conclusion we reach with respect to litigation-related fees does not signify that all payments that happen to be made to a lawyer are unrecoverable expenses under CERCLA. On the contrary, some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(a)(4)(B). The component of Key Tronic's claim that covers the work performed in identifying other potentially responsible parties falls in this category ....
>
> . . . . .
>
> This reasoning does not extend, however, to the legal services performed in connection with the negotiations between Key Tronic and the EPA that culminated in the consent decree. Studies that Key Tronic's counsel prepared or supervised during those negotiations may indeed have aided the EPA and may also have affected the ultimate scope and form of the cleanup. We nevertheless view such work as primarily protecting Key Tronic's interests as a defendant in the proceedings that established the extent of its liability. As such, these services do not constitute "necessary costs of response" and are not recoverable under CERCLA.

Id. at 819-21 (footnote omitted).

Plaintiffs concede that litigation-related attorney's fees are not recoverable in light of *Key Tronic,* but contend that the fees generated by their attorneys in attempting to identify the insurers of St. Clair Rubber qualify under the "investigative" exception cited above.

We disagree. In our view, *Key Tronic* contemplates a narrow exception to the general rule prohibiting the recovery of attorney's fees. That exception is limited to steps taken to finger previously unidentified parties that might bear some legal responsibility under the terms of CERCLA for pollution of the site. In this case, St. Clair had already been identified; indeed, it was a named defendant. Its insurers, although perhaps contractually liable for some of the costs related to the clean-up, are not potentially responsible parties under § 107(a) of CERCLA and thus any attorney's fees related to their identification fall outside the exception and are not recoverable.[6]

Accordingly, we affirm the district court's denial of attorney's fees.

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[6] We note in passing that plaintiffs seek reimbursement of attorney's fees incurred in deposing Seabourn Livingstone. Yet that is precisely the type of task that can only be performed by an attorney, one of the considerations listed by *Key Tronic* that would support a denial of fees.

Furthermore, like the environmental studies disallowed in *Key Tronic,* the identification of St. Clair's insurers primarily protected plaintiffs' interests since they sought monetary compensation from the company.

III.

In *Cordova,* this court held that "where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met." *Cordova,* 113 F.3d at 580. In determining the requisite standard for piercing the veil, federal courts must look to state law. *Id.* Since both *Donahey* and *Cordova* arose in Michigan, this court's reading of the Michigan doctrine of veil piercing applies to the case before us:

> Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil. There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. Organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form.

Cordova at 580 (citations and footnote omitted).

Michigan courts recognize that stockholders, like parent corporations, are shielded from liability unless the requirements necessary to pierce the corporate veil are

satisfied: "The corporate form is valid and will be protected by courts even when there is a single stockholder who is entitled to dominate the company and receive all of its profits." *Allstate Ins. Co. v. Citizens Ins. Co. of America,* 118 Mich. App. 594, 600, 325 N.W. 2d *505,* 508 (1982) (citing *Gottlieb v. Arrow Door Co.,* 364 Mich. 450, 110 N.W.2d 767 (1961)). Given the similar treatment accorded parent corporations and stockholders with respect to vicarious liability, it is clear to us that the standard articulated in *Cordova* before operator liability can attach should be extended to stockholders of a corporation. We therefore hold that a stockholder is not liable as an operator as defined by § 107(a)(2) of CERCLA unless circumstances justify piercing the corporate veil.[7] Because there are no facts present that would justify such veil-piercing in this case, Livingstone is not liable as an operator for the clean-up of the property in question.

Accordingly, the decision of the district court holding that Seabourn Livingstone is not liable under § 107(a)(2) of CERCLA is affirmed.

IV.

Finally, Donahey asks us to revisit certain issues decided by the original panel in addition to those already discussed. While our "law of the case" doctrine does not require an en banc court to adhere to the decision of a prior

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[7] Although *Cordova* also provided for § 107(a)(2) liability for parent corporations that directly operate the facility, 113 F.3d at 579, that scenario is not before us with respect to Livingstone.

panel, *see* 6th Cir. Rule 14(a) ("[T]he effect of the granting of a rehearing *en banc* shall be to vacate the previous opinion and judgment of this court"), we believe that the reasoning of the prior panel was correct on all issues not otherwise discussed in this opinion. Accordingly, we reinstate and reaffirm *Donahey v. Bogle,* 987 F.2d 1250 (6th Cir. 1992), except as to attorney's fees and § 107(a)(2) operator liability.

V.

This action is remanded to the district court for proceedings consistent with this opinion.

CONCURRENCE

RYAN, Circuit Judge, concurring. I concur in the majority opinion solely because I think I am obligated to do so by reason of the precedentially binding decision of this court in *United States v. Cordova Chemical Co.,* 113 F.3d 572 (6th Cir. 1997) *(en banc).* As I explained in my dissenting opinion in that case, I think the court was seriously and obviously mistaken in its conclusion that a parent corporation could not be held directly liable as an "operator" under 42 U.S.C. § 9607(a)(2), but only derivatively so, and then only if, under applicable state law, its corporate veil could be pierced.

Now, the court extends that rather obvious misreading of CERCLA to protect a 100% shareholder of an ostensible operator corporation from direct section 107(1)(2) liability no matter what the evidence shows as to his activities. The principle of law governing the two cases is indistinguishable, and therefore I am constrained to concur in the judgment.

DISSENT

BOYCE F. MARTIN, JR., Chief Judge, dissenting. According to the en banc majority opinion, the sole shareholder of a corporation will escape liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675, for environmental damage unless there are grounds for piercing the corporate veil. The majority has extended *United States v. Cordova Chem. Co. of Michigan,* 113 F.3d 572 (6th Cir. 1997), *petition for cert. filed,* 66 U.S.L.W. 3157 (U.S. Aug. 8, 1997) (No. 97-296), an opinion on corporate veil piercing and CERCLA, to protect shareholders from environmental liability in all but the most extreme cases. I dissented in *Cordova,* and I write again to register my continuing unhappiness that the majority has turned a blind eye to congressional intent. The en banc majority merely compounds the error of *Cordova* and pushes responsibility for environmental liability onto the wrong parties. The majority opinion not only creates new law but also offers novel opportunities for the savvy polluter. Therefore I dissent on this issue.

The majority opinion relieves defendant Seabourn Livingstone of CERCLA responsibility, but the larger problem is the blueprint it provides for future environmental malfeasors. Facility owners and operators are liable for pollution under 42 U.S.C. § 9607(a)(1) and (2), but the ruling of the en banc majority provides the savvy polluter with a way to avoid that liability. The savvy polluter can form a closely held corporation of which he holds 100 percent of the shares. He can play an active role in the company but follow a "don't ask, don't tell" policy regarding the disposal of environmental

toxins. This savvy polluter, although he manages the company and owns all the shares, nonetheless will not be considered an "owner" or "operator" under the majority's reading of CERCLA. The only way to reach the savvy polluter is to pierce the corporate veil and hold him derivatively liable. Of course, the hypothetical polluter posited herein is savvy enough to realize that in some states it is easier to pierce the veil than it is in others. He therefore will incorporate where he has the greatest protection. In Michigan, for instance, the savvy polluter will be protected from veil piercing unless it can be shown that he engaged in fraud--a difficult evidentiary standard to meet. *Cordova,* 113 F.3d at 580. In this way, the en banc majority opinion short-circuits CERCLA.

The majority gives the savvy polluter an opportunity to play state law off against federal law. A corporation is a product of state law. As such it should not provide a shield behind which an individual can flaunt federal law. "[T]he Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies." *First Nat 'l City Bank v. Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611, 630 (1983). One of the legislative policies behind CERCLA is to make "those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created." *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991) The en banc majority allows Livingstone to misuse a state creation, a corporation, to circumvent a federal policy.

Federal-state issues aside, this case is not about imposing liability on the average shareholder. In discussing "shareholder" liability in this context, I limit my comments specifically to sole shareholders who are active in the

corporation. I reserve the question of the liability of people who own less than 100 percent of a corporation's shares or who are not active in management. I do so because CERCLA specifically excludes shareholders who are not involved in the management of companies from the definition of "owners" and "operators." 42 U.S.C. § 9601(20)(A)(iii). The explicit exclusion of one class of shareholders from the class of owners or operators "implies that an owning stockholder who manages the corporation . . . is liable under CERCLA as an 'owner or operator.'" *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985). Some degree of control of the corporation is necessary.

Livingstone does not fall into the class of shareholders excluded by 42 U.S.C. § 9601(20)(A)(iii)because he exercised the requisite control. Livingstone owned 100 percent of the St. Clair Rubber Company's stock. By definition, anyone who owns all the stock has plenary power to run a company, but Livingstone's formal role in the company is also well recorded. Livingstone was active in managing the financial aspects of the business. He was the treasurer and chairman of the board. The district court found that although "Livingstone had the authority to control waste disposal practices, he never exercised such authority." Mem. Op. at 28-29. Simply ignoring environmental misdeeds, however, should not be a way of avoiding CERCLA liability. *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995), *cert. denied,* 117 S.Ct. 50 (1996) (noting, in context of arranger liability, that it would violate the goals of CERCLA if "[a] corporate officer, who has virtually unlimited control over a company and in fact exercises that control but knows well enough to close his or her eyes to the specific details of the company's hazardous waste disposal practices, could avoid CERCLA

liability"). The district court found that the St. Clair Rubber Company's activities caused environmental harm, but the buck did not stop with St. Clair because the company was dissolved in the early 1980s. Mem. Op. at 9. Nor did the buck stop with Livingstone.

Livingstone, however, should bear responsibility as a "covered person" under 42 U.S.C. § 9607. In light of his role as owner and manager, Livingstone is an "operator" under CERCLA. *TIC Inv. Corp.*, 68 F.3d at 1089 (holding that arranger liability, which is analogous to operator liability, for corporate officers is premised on having authority to control that is exercised directly or indirectly); *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986); *Shore Realty*, 759 F.2d at 1052. Because he had the ability to control waste disposal, it need not be shown that Livingstone actually was involved in the disposal. A good analysis is found in *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1544 (W.D. Mich. 1989): "[T]he focus on the inquiry is whether the corporate individual could have prevented the hazardous waste discharge at issue." We should adopt a similar view. Livingstone could have stopped the pollution. He did not.

Given that Livingstone can be considered an "operator" of the company in the parlance of CERCLA, the en banc majority is speaking in the wrong idiom when it talks of piercing the corporate veil in order to hold him derivatively liable. Under derivative liability, a shareholder would be held responsible for the environmental sins of his corporation if the corporate veil could be pierced. There is no reason to discuss piercing the corporate veil when a 100 percent shareholder can be held directly liable as an operator under 42 U.S.C. § 9607(a)(2). As the district court stated in an unreviewed

opinion in *Kelley:* "I believe that CERCLA's statutory scheme varies the configuration of traditional corporate principles which prevent individual liability absent a conclusion that an individual engaged in procedural irregularities justifying a court in 'piercing the corporate veil' .... "727 F. Supp. at 1542.

I am not advocating the total disregard of limited liability for shareholders. Limited liability is too important to capital formation to be readily dismissed. My dissent covers a far more restricted class of persons than the average shareholder. A holder of one share of stock in a Fortune 500 company need not fear personal liability for the company's potential environmental liabilities. When, however, a person owns all the shares in a corporation and plays a management role, that person should be considered an operator under 42 U.S.C. § 9607(a)(2) and subjected to the corresponding liability under CERCLA. I therefore respectfully dissent from the majority opinion.

APPENDIX B

NOS' 92-1128: 92-1151

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
November 17, 1997
LEONARD GREEN, Clerk

RICHARD M. DONAHEY; PATRICIA A. DONAHEY, *Plaintiffs-Appellants/ Cross-Appellees,*	)	**JUDGMENT**
v.	)	
HELEN L. BOGLE, *Defendant-Appellee/ Cross-Appellant,*	)	
SEABOURN S. LIVINGSTONE; H. GORDON WOOD; ST. CLAIR RUBBER COMPANY, *Defendants-Appellees.*	)	

Donahey, et al. v. Bogle, et al.
92-1128

Before: **Martin**, Chief Judge; **Merritt, Kennedy, Nilburn, Nelson, Ryan, Boggs, Norris, Siler, Batchelder, Daughtrey,** and **Moore**, Circuit Judges.

UPON CONSIDERATION of the opinion of the United States Supreme Court and reconsideration of the original opinion and judgment of this court of March 9, 1993,

THIS CAUSE was heard and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that Donahey v. Bogle, 987 F.2d 1250 (6th Cir. 1992) is REINSTATED and REAFFIRMED, except as to attorney's fees and § 107(a)(2) operator liability. IT IS FURTHER ORDERED that the case is REMANDED for further proceedings consistent with the opinion of the Court.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

Issued as Mandate: **December 9, 1997** A True copy.

COSTS: **NONE**
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Attest:

/s/_____
Beth Manning
Deputy Clerk

APPENDIX C

OPINION

(United States Court of Appeals -- Sixth Circuit)
(Argued November 20, 1992; Decided March 9, 1993)

(Richard M. DONAHEY and PATRICIA A. DONAHEY, Plaintiffs-Appellants, Cross-Appellees, v. Helen L. BOGLE, Defendant-Appellee, Cross-Appellant, Seabourne *[sic]* S. Livingstone; H. Gordon Wood; St. Clair Rubber Company, a Michigan corporation, jointly and severally, Defendants-Appellees -- Nos. 92-1128, 92-1151)

Before: KEITH and JONES, Circuit Judges; and ALLEN, Senior District Judge.*********

CHARLES M. ALLEN, Senior District Judge.

The appeals and cross appeals of the parties arise out of a judgment entered following a lengthy bench trial and a 48-page Findings of Fact and Conclusions of Law. The issues presented to the trial court and to this Court involve the respective rights of the Donaheys and Helen Bogle under

********* The Honorable Charles M. Allen, Senior United States District Judge for the Western District of Kentucky, sitting by designation.

Michigan land purchase law and the rights and liabilities of all the parties under the Comprehensive Environmental Response Compensation and Liability Act (hereinafter CERCLA), 42 U.S.C. § 9601 et seq.

The Donaheys appealed from the judgment of the trial court holding that Richard Donahey was liable under his land purchase contract to Helen Bogle. In addition the Donaheys appealed from the judgment of the trial court that their claims under CERCLA were without merit and that they were not entitled to declaratory judgment relief for future cleanup of the property purchased by the Donaheys. Helen Bogle appeals from the judgment which held that she was a "responsible party" under CERCLA and she contends that she is entitled to a monetary judgment in excess of that awarded by the trial court. Both Helen Bogle and the Donaheys challenge the findings of the court that Seabourne Livingstone was not a "responsible party" under CERCLA.

In 1962, St. Clair Rubber Company rented Marysville, Michigan property for a period of ten years. The lessor was Helen Bogle, who is the sister of Seabourne Livingstone, the sole stockholder of all the stock of St. Clair Rubber Company. The property was again leased in 1972 for another ten year period.

St. Clair's manufacturing processes left a waste product that was combined with a solvent. This mixture was drained into 55 gallon drums and designated as sludge. In the early 1970s, St. Clair transported 12 to 20 barrels or drums of sludge to the property every six months for disposal. After allowing the sludge to drain from the barrels for approximately one week. the employees returned to burn the sludge. Some time in the 1970s, St. Clair stopped its dumping and burning at the property.

In 1981, Bogle listed the property for sale. Donahey, the majority stockholder of a manufacturing firm, inspected the property and charted an area used as a dump. His attorney sent a letter to Bogle expressing concern over the presence of a "dump." To allay concern, St. Clair and Donahey entered into an "Agreement to Clean Up Dump", in which St. Clair promised to remove any hazardous substances found on the property and to restore the land to an environmentally satisfactory condition. The agreement included St. Clair's promise to indemnify Donahey for costs resulting from St. Clair's contamination of the land.

On the same day in 1982 on which Donahey and St. Clair executed the clean up agreement, Donahey purchased the property from Bogle for $115,000. Their contract provided for a down payment of $28,750, with the balance of the purchase price to be paid over a period of ten years at 11% interest in monthly installments of $ 980.31.

In 1985, following the publication of a newspaper article revealing the existence of environmental contamination at the site, the Michigan Department of Natural Resources (hereinafter "MDNR") sent letters designating each party to this law suit a "potentially responsible party," and requesting certain monitoring and clean-up activities. In 1986, the Donaheys employed an environmental consultant, Lawrence Halfen, to advise them with respect to the contaminated property.

Dr. Halfen's preliminary investigation found a number of rusting and corroding barrels and non-hazardous waste materials which posed no immediate threat to the environment. After receiving authorization to proceed, he began work in August 1987, collecting and disposing of these old barrels and other materials . He removed approximately

350 cubic yards of material from the site at a cost of approximately $ 28,000.

However, at the end of the third day of removing the barrels and scraping the site, workers discovered five pits that contained hazardous substances. Dr. Halfen decided to address the problem on a temporary basis. He removed the materials from the pits so that he could assess their nature and volume. After draining the lagoon, he consolidated the pit materials with contaminated and uncontaminated soils taken from other areas at the site and placed the mixture in the lagoon basin. He placed a cap over the mound of materials, erected a snow fence around the area, and obstructed roadway access to the site.

Dr. Halfen characterized his treatment of the materials as a judgment call in the face of an immediate threat. He did not seek the advice of the MDNR. He completed his operations in late August 1987, and on September 1, 1987, he telephoned the MDNR representative to explain what he had found and what he had done. The MDNR never communicated to Donahey or to Dr. Halfen any protests about the work that Dr. Halfen did.

Subsequently, Dr. Halfen proposed further clean up measures at an estimated cost of $447,500. Unwilling to undertake the cost of further clean up efforts, the Donaheys abandoned the property in 1990.

The Donaheys filed suit asserting statutory and common law causes of action against Bogle, St. Clair Rubber and Seabourne Livingstone. They sought to rescind the purchase contract with Bogle, to recover costs incurred in attempting to clean up the environmental situation, and to recover attorneys fees of more than $279,000 incurred in these proceedings. By counterclaim, Ms. Bogle alleged a

breach of the land purchase contract and failure to pay the sums clue under that contract and she sought a judgment for the unpaid amounts plus interest. In addition, she asked for a declaration that she was not a covered party under CERCLA, and that Livingstone, Mr. Donahey and Mrs. Donahey were all covered parties.

The matter of rescission was first addressed on a summary judgment motion by District Judge Harvey, who found that the Donaheys were not entitled to rescission. After trial, District Judge Zatkoff reiterated that ruling, and made additional findings and conclusions, including the following pertinent to these appeals:

1. Mrs. Bogle was entitled to judgment for the unpaid balance owing on the land purchase contract plus interest on past due payments at the rate of 11% per year from June 8, 1987 until March 14, 1989 (the date of filing of the counterclaim), together with pre-judgment interest from March 14, 1989 to the date of the judgment and judgment interest after the date of judgment.
2. Richard Donahey, Helen Bogle and St. Clair Rubber were covered persons under 42 U.S.C. § 9601 et seq. with respect to the environmental contamination at issue, but neither Pat Donahey nor Livingstone were covered persons.
3. None of the parties had incurred any recoverable response costs under CERCLA and the Donaheys were not entitled to a declaration of future liability pursuant to 42 U.S.C. § 9613(g)(2).
4. Richard Donahey was required to accept title to the property and if he failed to do so, Mrs. Bogle was entitled to present the judgment as deed of ownership

to Richard Donahey.

5. Mrs. Bogle had no cause of action against St. Clair Rubber, Livingstone, and the Donaheys under CERCLA.

Before reaching the question of who is responsible for the cost of clean up, we must first dispose of the argument of Donahey that he is entitled to rescind the contract for the purchase of the land. He argues that the environmental contaminants that he discovered after the purchase contract was executed constituted an encumbrance that prevented Bogle's transferring clear title to the property. The trial judge properly held that an "encumbrance" is a mortgage or a mechanics lien or tax lien or something of that nature that diminishes the value of the title to the property; environmental contaminants may diminish the value of the realty, but they do not constitute an encumbrance because they do not affect title. Furthermore, the contract between Donahey and St. Clair, by which St. Clair agreed to clean up the environmental contamination provided the trial court with ample evidence to support the determination that Donahey knew before purchase that there were environmental contaminants on the property.

The trial judge was also correct in finding that Donahey had breached the contract with Bogle. The record clearly shows that as early as 1987 Donahey stated that he would not make any further payments on the real estate contract. This was anticipatory breach under Michigan law. *Jackson v. American Can* Co., *Inc.*, 485 F. Supp. 370 (W.D. Mich. 1980), and *Brauer v. Hobbs,* 151 Mich. App. 769, 391 N.W.2d 482 (1986).

Bogle contends that the trial court erred in calculating interest on her monetary award and that she is entitled to both

statutory and contractual interest from March 14, 1989 to the date of judgment. The only Michigan authority cited on this point, *McGraw v. Parsons,* 142 Mich.App. 22, 369 N.W. 2d 251 (1985), fully supports Bogle's position.

We turn next to the issues raised under CERCLA. First, the trial court held that the Donaheys were not entitled to recover any costs under CERCLA for the actions which they took in an attempt to cleanup the property. Secondly, it held that Richard Donahey, Bogle, and St. Clair Rubber were responsible parties for the contamination of the property under 42 U.S.C. § 9607 but also held that Seabourne Livingstone was not liable as an owner or operator because he did not actively participate in the day-to-day activities of the corporation and had no knowledge of the environmental contamination created by it. In addition Bogle appeals from the findings that she was a responsible party as a former owner of the property, and also appeals from the court's findings that Patricia Donahey was not a covered person under 42 U.S.C. § 9607(a).

The trial court correctly found that Richard Donahey and Helen Bogle and St. Clair were "responsible parties" under 42 U.S.C. § 9607(a). However, the court erred in concluding that Seabourne Livingstone was not liable as an owner under CERCLA. The evidence clearly established that Livingstone had the authority to prevent the contamination of the property by his corporation; thus, as a matter of law, Livingstone was a responsible party. *Kelley v. Thomas Solvent Co.,* 727 F.Supp. 1532 (W.D. Mich. 1989): *New York v. Shore Realty Corp.,* 759 F.2d 1032, 1043 (2d Cir. 1985): *U.S. v. Ward,* 618 F.Supp. 884 (E.D.N.C. 1985): and U.S. v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726 (8th Cir. 1986).

The trial court rejected the contention that Halfen's actions were a legitimate "judgment call," and concluded that the Donaheys were not entitled to recover any of their costs incurred in the attempt to clean up the property. In making that determination, the court relied upon evidence that the substances discovered at the property were hazardous wastes within the meaning of Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6903(5). Section 6903(5) defines hazardous waste as a compound that may cause death or serious permanent illness or pose a health risk when improperly stored. ENVIRONMENTAL PROTECTION AGENCY regulations define hazardous waste at 40 C.F.R. 261.31, and among the chemicals so designated are benzene, toluene, and xylene, substances used in St. Clair's rubber manufacturing processes and in churn-washing procedures at St. Clair. Halfen's testimony corroborated the Judge's finding with reference to hazardous wastes.

The trial court found that the Donaheys' clean up effort did not comply with RCRA regulations in that Donahey failed to obtain an RCRA permit and failed to conduct a detailed physical and chemical analysis of a representative sample. See 40 C.F.R. § 270.1.1(c)(1)(ii), and 40 C.F.R. §264.13. The court also found that the Donaheys had failed to secure the site against unknowing and unauthorized entry by persons or livestock, and based his finding on evidence that the Donaheys had merely placed a snow fence around the consolidated pile in the large lagoon. The court also found that the Donaheys did not receive a permit or permit waiver for their storage of hazardous waste.

The trial court further relied on evidence that the Donaheys provided no drainage control, and that the consolidation of the wastes in the large lagoon increased the

surface area of waste exposed to top soil by 50%. The court also found that by relocating the waste from the rubber pile to the large lagoon, Halfen spread the contamination to a relatively untainted portion of the property. Based on these factors, the trial court held that the Donaheys' actions did not facilitate the goals underlying CERCLA nor did they in any way improve the condition of the defiled property.

In order to recover the costs incurred in employing Halfen and attempting to improve the environmental condition of their property, the Donaheys are required to show that the property on which hazardous substances were contained was a facility under CERCLA's definition of that term, that the release or threatened release of any hazardous substance from the facility had occurred, that such release or threatened release caused them to incur response costs that were necessary and consistent with the National Contingency Plan (NCP), and that defendant was one of the statutory classes of persons subject to liability, *3550 Stevens Creek Assoc. v. Barclays Bank,* 915 F.2d 1355 (9th Cir. 1990). In applying these standards to this case, the trial judge correctly held that an element of the Donaheys' prima facie case was a showing that the response costs incurred were consistent with or substantially in compliance with the NCP.

The trial court's findings that the cleanup work attempted by Halfen actually did more damage than benefit is substantiated by the testimony of Hunt, an expert witness, who stated that when Halfen consolidated non-hazardous material with hazardous material he contaminated the nonhazardous so that it would all have to be treated as hazardous. That, in turn, would make disposal much more complicated and expensive. Hunt estimated that it would have cost $305.000 in 1987 to dispose of the 1200 yards of

material mounded in the lagoon, whereas it would have cost only $178,000 to dispose of the 800 yards of material actually taken from the pits. Additionally. Hunt testified that Halfen had increased the health risks by creating an attractive nuisance and by necessitating repeated human contact with the hazardous material.

Although consistency with the NCP is a necessary element for recovery of remedial costs, it does not necessarily follow that consistency with the NCP is required for recovery of monitoring or investigative costs. In *Carlyle Piermont Corp. v. Federal Paper Board Co.,* 742 F.Supp. 814 (S.D.N.Y. 1990), the Court held that such costs are recoverable without regard to compliance with the NCP. *See also Artesian Water Co. v. Government of New Castle County,* 851 F.2d 643 (3rd Cir. 1988) (monitoring and impact evaluation costs recoverable regardless of existence of other compensable response costs). This Court believes the *Carlyle Piermont* reasoning on the instant issue is sound, and we will remand for award of the Donaheys' initial investigation costs.

Plaintiffs appealed from the decision of the trial court refusing to award them attorneys fees of $ 279,000. The trial court's refusal rests primarily on the American Rule, although he also points out that there is specific statutory authorization for the government to recover attorneys fees and no such specific authorization for private parties. However, this Court prefers to follow the reasoning of cases such as *Bolin v. Cessna Aircraft Co.,* 759 F.Supp. 692 (D. Kan. 1991), *Shapiro v. Alexanderson,* 741 F.Supp. 472 (S.D.N.Y. 1990), and *General Electric Co. v. Litton,* 920 F.2d 1415 (8th Cir. 1990), *cert. denied,* __ U.S. __, 111 S.Ct. 1390, 113 L.Ed.2d 446 (1991). The *Bolin* opinion made the following persuasive statement:

> By providing private parties with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. [citations omitted]. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs.

759 F.Supp. at 710.

In following cases cited immediately above, we recognize that there are several cases to the contrary, such as *T & E Industries, Inc. v. Safety Light Corp.*, 680 F.Supp. 696 (D. N.J. 1988); *Mesiti v. Microdot, Inc.*, 739 F.Supp. 57 (D. N.H. 1990); *Regan v. The Cherry Corporation*, 706 F.Supp. 145 (D. R.I. 1989).

We recognize that the Donaheys' complaint included ten causes of action, and that the only recovery they have achieved is the very small amount awarded for investigative costs. We remand to the district court the question of amount of attorneys fees in light of the above observations.

In conclusion, the judgment of the trial court is affirmed as to all aspects of the case except for the following:

1. The judgment is reversed insofar as it does not consider Seabourne Livingstone a responsible party under CERCLA.
2. The judgment is vacated with respect to cost of investigation, and the matter is remanded for

determination and award of these costs.

3. The judgment is vacated with respect to the interest recoverable by Helen Bogle, and the matter is remanded for determination and award of statutory and contractual interest from March 14, 1989 to the date of judgment in lieu of the pre-judgment interest which the trial judge awarded her for that period of time.

4. The judgment denying attorneys fees in toto is vacated, and the matter remanded for determination of what constitutes reasonable attorneys fees recoverable under CERCLA.

APPENDIX D

JUDGMENT

(United States Court of Appeals -- Sixth Circuit)

(Filed March 9, 1993)

(RICHARD M. DONAHEY; PATRICIA A. DONAHEY, Plaintiffs-Appellants/Cross-Appellees, v. HELEN L. BOGLE, Defendant-Appellee/Cross-Appellant, SEABOURN S. LIVINGSTONE: H. GORDON WOOD; ST. CLAIR RUBBER COMPANY, a Michigan corporation, jointly and severally, Defendants-Appellees – NOS: 92-1128: 92-1151; ON APPEAL from the United States District Court for the Eastern District of Michigan at Detroit.)

Before: **Keith** and **Jones**, Circuit Judges; **Allen**, Senior District Judge.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed in part, reversed in part, vacated in part, and the case is remanded for further proceedings in accordance with the opinion.

Donahey, et al. V. Bogle, et al.
92-1128

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green,
Clerk

Issued as Mandate: *June 25, 1993*
COSTS: None

(Certification Omitted)

APPENDIX E

ORDER

(United States Court of Appeals -- Sixth Circuit)

(Filed June 15, 1993)

(RICHARD M. DONAHEY; PATRICIA A. DONAHEY, Plaintiffs-Appellants/Cross-Appellees, v. HELEN L. BOGLE, Defendant-Appellee/Cross-Appellant, SEABOURN S. LIVINGSTONE, H. GORDON WOOD; ST. CLAIR RUBBER COMPANY, Defendants-Appellees– Nos. 92-1128/1151)

BEFORE: KEITH and JONES, Circuit Judges;. ALLEN, Senior United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Donahey, et al. v. Bogle, et al.
92-1128

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green,
Clerk

(Certification Omitted)

* Hon. Charles M. Allen sitting by designation from the Western District of Kentucky.

APPENDIX F

ORDERS FOR JUNE 13 THROUGH

JUNE 17, 1994

JUNE 13, 1994

Certiorari Granted--Vacated and Remanded

No. 93-428. LIVINGSTONE *v.* DONAHEY ET AL. C.A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Key Tronic Corp. v. United States,* 511 U.S. 809 (1994). Reported below: 987 F. 2d 1250.

APPENDIX G

No. 87-CV-74771

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

FILED
October 1, 1991
THEBOLT, CLERK

RICHARD M. DONAHEY AND PATRICIA A. DONAHEY, *Plaintiffs*	)	HON. LAWRENCE P. ZATKOFF
v.	)	**MEMORANDUM OPINION AND ORDER**
HELEN L. BOGLE, *Defendant and Counter-Plaintiff*, and SEABOURN S. LIVINGSTONE, H. GORDON WOOD AND ST. CLAIR RUBBER COMPANY, a Michigan Corporation, jointly and severally, *Defendants*.	)	

/

Donahey v. Bogle, et al.
87-CV-74771

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 1st day of October, 1991.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF, UNITED STATES DISTRICT JUDGE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter is before the Court on plaintiffs' civil action under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq. to recover costs expended in an alleged clean-up of environmentally contaminated realty. Defendant Helen Bogle filed a counterclaim against plaintiffs for contribution and filed crossclaims against the other defendants for contribution. A bench trial was conducted from May 2 to May 15, 1991, excluding weekends. Upon the Court's request, each party filed post-trial proposed findings of fact and conclusions of law and supplemental briefs on select legal and factual issues raised at trial. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court herein formalizes the findings of fact and conclusions of law as earlier set forth on the record.

JURISDICTION

Jurisdiction is predicated upon §§ 1331 and 1367 of Title 28, United States Code.

FINDINGS OF FACT

Based upon the record established in this case and upon proofs presented to the Court at trial, the Court makes the following findings of fact:

The property that is the subject of this civil action is located at 2408 Wills, in the City of Marysville, St. Clair County, Michigan. Such property shall hereinafter be referred to as "the property." The property is near the St. Clair River.

The City of Marysville draws its drinking water from the St. Clair River. The surface water intake is located one and one half miles upstream from the property. Approximately 3000 people in the area use private wells for their drinking water supplies. The geology of the area is characterized by a ninety foot thick layer of clay overlying a glacial sand and gravel aquifer from which private wells draw. The property is also near a wetland. The property can be viewed from Carlton Street, which is west of Wills.

Numerous rusted, corroded drums and rubber piles are present on the property.

In 1942, the Dow Chemical Company first developed the property for industrial production. In 1959, H. Scherer & Company acquired title to the property from Fort Diecasting Company.

Defendant-Helen Bogle[1] and Seabourn S. Livingstone are siblings. Their grandfather founded St. Clair Rubber Company, which their father, Seabourn R. Livingstone,

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[1] Helen Bogle has also had the last names "Howard" and "Spender."

subsequently came to own and operate. During his ownership of the company, Seabourn R. Livingstone acted as president and chief executive officer.

On August 16, 1961, Seabourn R. Livingstone died. Shortly thereafter, his son, defendant-Seabourn S. Livingstone, acquired all of the outstanding stock of St. Clair Rubber Company.

Defendant St. Clair Rubber Company ("St. Clair") began operating a rubber manufacturing facility in the mid 1950s at the Will Street property.

On October 31, 1962, defendant Helen L. Bogle ("Bogle") acquired title to the property as part of a distribution of assets from H. Scherer & Company, a family holding company.

On October 31, 1962, St. Clair Rubber Company leased the property from Helen Bogle ("Howard" at the time) for a term of ten years. The parties subsequently renewed the lease for a period of ten years, thereby creating a continuous landlord-tenant relationship for a twenty year period. St. Clair Rubber's regular monthly rent payments to Bogle terminated in 1979.

Throughout the time period relevant to this case, St. Clair Rubber operated three industrial facilities: (1) the "main plant" located on Michigan Avenue in Marysville, Michigan; (2) the "adhesives plant" located on Mill Street in Marysville, Michigan; and (3) the Will Street "tank plant" (also known as the "poly plant") located on the property that is the subject of this case.

St. Clair's manufacturing processes utilized various organic compounds, including aromatic compounds such as, but not limited to, methyl-ethyl-ketone ("MEK"), benzene, xylene, hexane, toluene and various other compounds such as

resins and rubber raw materials.

From October 31, 1962 to January 6, 1982, as landlord, Bogle never personally inspected nor caused anyone on her behalf to visit or inspect the property, despite having retained the right to conduct inspections under both leases.

One of St. Clair's manufacturing processes involved the blending of resins, solvents (for example, MEK, toluene, benzene, and other aromatic organic substances) and other raw materials to produce various rubber products and adhesives. These materials were blended in large industrial churns. This blending process was originally performed in a churn room located at the main plant. However, the churn room was subsequently relocated to the adhesives plant at Mill Street.

The blending process left a waste product on the churns that St. Clair removed by treating the churns with additional solvent. The waste product combined with the additional solvent, and the resulting "sludge" was drained off into 55 gallon drums. The drums containing the sludge were marked to indicate the type of washing solvent used and the fact that they were waste products. The sludge stored in the drums was multi-colored--green, black, red, orange and yellow.

In 1955 at the main plant, 55 gallon drums of sludge were emptied on to flat ground on a large site and their contents were burned as a method of disposal. The city of Marysville subsequently prohibited St. Clair from disposing of its waste products by burning it on the open ground at the main plant.

The sludge was routinely submitted for reclamation. However, reclamation stopped, and St. Clair began disposing of its waste products in the early 1970s.

In the early 1970s, at the subject property, St. Clair created a pond measuring 60 feet in length, 60 feet in width and 2 feet in depth. The pond was located west of the only building located on the property–between the building and the power lines.

Typically, St. Clair employees transported 12 to 20 barrels or drums of sludge from the adhesive plant to the property every six month for disposal. The employees allowed the sludge to drain from the barrels for approximately one week, after which they returned to burn the sludge. At the behest of the City of Marysville, St. Clair stopped its dumping and burning at the property in the 1970s.

In 1981, Bogle listed the property for sale. Craig Mercier ("Mercier") was Bogle's agent. In the fall of 1981, Craig Mercier ("Mercier"), then a salesperson with Schostak Bros. & Co., Inc., visited the property in order to calculate a sale price. To this end, Mercier inspected the building, but not the western portion of the property where the dumping and burying of hazardous wastes occurred.

In the fall of 1981, Richard Donahey expressed an interest in purchasing the property. Richard Donahey is the majority stockholder in a closely held corporation, United Brass Works, Inc., which owns a subsidiary, Daca, Inc. His interest in the property arose out of its close proximity to Daca manufacturing facilities.

Richard Donahey inspected the property, and based on his inspection, charted an area on the property used as a dump.

In the fall of 1981, Richard Donahey was familiar with the risk of environmental liability posed by the maintenance and use of industrial realty. This knowledge stemmed from his liability for polychlorinated butyl ("PCB") contamination

on Daca, Inc. land that was acquired by United Brass Manufacturing, Inc.

On December 11, 1981, Edward Schulte, acting as Richard Donahey's attorney, sent a letter to Bogle' expressing concern over the presence of a "dump" on the property.

To allay Richard Donahey's concern over the environmental condition of the property, St. Clair, the former tenant of the property, entered into an "Agreement to Clean Up Dump" ("the agreement"--trial exhibit 6) with Richard Donahey, which was executed on January 6, 1982, the same day that Richard Donahey would eventually execute a land contract with Bogle. In the agreement, St. Clair Rubber promised to remove any hazardous substances found on the property and to restore the land to an environmentally satisfactory condition. Additionally, the agreement includes St. Clair Rubber's promise to indemnify Donahey for costs resulting from St. Clair Rubber's defilement of the land.

Before he purchased the property, Richard Donahey knew that the land may have been environmentally defective, may have presented federal environmental violations, and had the potential of spawning a lawsuit. Richard Donahey also knew that the property had been used as an industrial dump. As indicated by the evidence introduced at trial, particularly but not limited to the "agreement to clean up dump," despite Richard Donahey's understanding that his knowledge of the environmental condition of the property was limited, he executed the land contract for the sale of the property.

Mercier was aware that the Donaheys learned of the dump after the purchase agreement was executed on November 10, 1981.

On January 6, 1982, Richard Donahey purchased the

property from Bogle on a land contract.[2] The purchase price for the property was $115,000, with $28,750 paid down, and the balance of the purchase price at 11% interest to be paid in monthly installments of not less than $980.31.

From 1962 to 1982, defendant-Seabourn S. Livingstone was the sole shareholder, chairman of the board of directors, and treasurer of St. Clair Rubber Company.

St. Clair's Michigan Annual Reports for Profit Corporations for the period spanning 1979-1983 repeatedly and consistently indicate that its term of existence was to expire on March 18, 1983. In the early 1980s, St. Clair Rubber dissolved and ceased to exist as a corporation.

Former employees of St. Clair provided the Michigan Department of Natural Resources ("MDNR") with detailed accounts of St. Clair's waste disposal practices.

A December 1985 newspaper article publicly revealed the existence of environmental contamination on the property for the first time. Bogle and Richard Donahey learned of the article shortly after it was published.

Soon thereafter, the MDNR sent each party to this suit a letter designating each as a potentially responsible party, and requesting the performance of certain monitoring and clean-up activities.

In the spring of 1986, the Donaheys hired an environmental consultant, Lawrence Halfen, to supply technical assistance in determining their course of action. At all times relevant hereto, Halfen acted as agent of and on

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[2] Richard Donahey deeded the property to himself and his wife, Patricia Donahey, on January 28, 1982. On September 7, 1988, Richard and Patricia Donahey deeded the property to Richard Donahey.

behalf of the Donaheys.

Halfen met Richard Donahey on the property in June of 1986 to inspect, survey and photograph the land. The photos painted a picture of a piece of land that was clearly used as an industrial dump site: corroded drums, hardened rubber-like deposits and surface lagoons dotted the landscape. Halfen also collected samples of water from the western portion of the large lagoon, rubber samples from the small rubber pile within the fenced area, and rubber samples from the large rubber pile outside the fenced area. Halfen also noted the small and large rubber piles that were inside and outside the fenced area, respectively.

Based on the totality of the circumstances--the appearance of the drums and barrels, the hardened rubber deposits on the surface that Halfen believed to have once contained solvents, and the test results obtained by environmental officials--the Court concludes that a "release" of solvents occurred before Richard Donahey purchased the property.

In August, 1986, the EPA and MDNR authorized Ecology and Environment, Inc. ("EE")[3] to test soil samples from the property. Halfen met EE employees on the property and accompanied them in order to obtain split samples.[4] EE took five split samples that day. EE performed inorganic and organic analyses on the samples. The test results appeared in

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[3] Ecology and Environment, Inc. is a private corporation that contracts with EPA and MDNR to provide testing services.

[4] To achieve "split samples," a sample is literally split into two portions so that the test results obtained from one sample can be verified by running an independent analysis on the other sample.

a Field Investigation Team Report ("FIT Report"), the results of which were provided to the Donaheys' attorney at that time, David Maurer, and Halfen.

On August 3, 1987, plaintiffs notified Bogle that all future payments on the land contract would be placed in escrow.

Plaintiffs have failed or refused to pay any monthly installments due under the land contract since July, 1987, inclusive.

The belief that a release had occurred, the FIT Report, and pressure from the MDNR compelled Halfen to recommend that the visible surface contamination be transported to and disposed of in a landfill, and that the surface lagoons be drained and filled. In this respect, Halfen prepared a proposal for the Donaheys' review. Halfen's proposal included plans for collecting the surficial rubber deposits and trash, securing a license for disposal, loading and transporting the material to a landfill, and restoring the topography of the site. The approximate cost of the surficial clean-up was $30,000-35,000.

After reviewing Halfen's proposal to remove barrels and wastes on the surface of the property, the Donaheys decided to permit Halfen to perform a "surficial" clean-up of the western portion of the property. On behalf of the Donaheys, attorney-Maurer instructed Halfen to execute the proposed clean-up. As part of the clean-up, Halfen planned to fill two lagoons that were on the property. The larger lagoon measured about 100 feet in length by 40 feet in width, by 5 feet in depth. The smaller lagoon was approximately the same depth and measured 27 feet long and 22 feet wide.

Halfen was on the property from August 24, 1987 to August 28, 1987.

Halfen first removed the wire fence that partially surrounded the dump site, some fibrous drums, rubber deposits, the small rubber pile, and part of the large rubber pile, totaling 350 cubic yards of hazardous materials. The materials, tainted by the hazardous wastes, were sent to landfills for disposal.

While directing a backhoe in the surficial clean-up effort, Halfen noticed a swath of gelatinous material--about six to twelve inches wide, six to eight feet long, and six inches deep--along the backhoe's tire track. Halfen also heard complaints from the machine operator that the ground was less than stable and was not adequately supporting the great weight of the backhoe. Halfen grew suspicious and probed the nearby ground with a six foot metal rod. The rod easily penetrated the ground, and when extracted, bore the distinctive and strong odor of solvents and aromatic organic compounds. Halfen decided to explore the region around the area of exposure and instability by digging with the backhoe and, in doing so, discovered buried "pits" ranging from six to ten feet deep. These pits contained corroded drums and large quantities of multi-colored, gelatinous material composed of solvents and aromatic organic compounds of the type used by St. Clair in its manufacturing processes. The western boundary of the pit area was ten feet from the eastern border of the large lagoon.

Halfen's actions resulted in the discovery of five buried pits. These pits were separate and distinct from the large and small lagoons situated on the surface of the property, although the small lagoon did sit over part of the pit area. Together, the five pits contained 800 cubic yards of hazardous material.

At that point, the property presented Halfen with five

pits encasing gelatinous material containing solvents and aromatic organic compounds, two lagoons, and part of the large rubber pile.

After consulting with and receiving the approval of the Donaheys, Halfen decided to excavate the pits and place their contents in the large lagoon. To achieve this result, Halfen drained the large lagoon of its water and packed rubber deposits from the large rubber pile around the perimeter of the large (and drained) lagoon. Halfen used the backhoe to transfer the contents of the pits into the large lagoon. Clean fill dirt was then used to fill the pit area, and pit area was restored to an even grade.

According to Halfen, the consolidation effort stemmed from his concern for site safety and containment problems caused by the discovery and exposure of the underground pits. Specifically, Halfen worried about water run-off, fire threat, and the presence of an attractive nuisance.

At least two surficial locations on the property evidenced solvent contamination: the bottom of the large lagoon was dotted with rubber deposits that had the distinct odor of solvents; and the southern half of the large rubber pile had a definite solvent odor.

The consolidated waste pile, not including cover materials, in the large lagoon totaled 1200 cubic yards. To this was added soil from the large rubber pile area. A black plastic tarp was used to cover the entire mound, and clean fill was placed over the tarp to keep it in place. Halfen erected a snow fence bearing "hazardous waste" warning stickers around the entire pile. The total volume of the consolidated waste pile--including the dirt from the large rubber pile, the clean fill, and the tarp--is 1600 cubic yards, and the consolidated waste pile (and all of its augmentations) rises

three feet above grade.

Despite the additional time and effort necessitated by the discovery and consolidation of the underground pits, the added risk of handling hazardous materials, and the altered nature of the clean-up effort, the actual cost of the clean-up was $33,000, very closely approximating Halfen's initial cost estimate for the simple surficial clean-up.

On September 1, 1987, Halfen reported his activities on the property to the MDNR.

In late 1987, Halfen prepared a second proposal for cleaning-up the property and it included consideration of the gelatinous waste material discovered in the five pits. The estimated cost of the second clean-up was approximately $450,000. The Donaheys never approved the second proposal. Because of changes in the law since 1987, the current cost of cleaning-up the property approximates $1,000,000.

Donaheys' claimed response costs consist of two components: (1) $53,195.97 for consulting fees, including $33,000 paid to Halfen for the consolidation of the hazardous materials in one mound on the subject property, and (2) $279,366.80 for attorney fees, most of which were generated by the Detroit based law firm of Dickinson, Wright et al. for legal services provided up to, but not including preparation for, trial.

In July of 1987, plaintiffs stopped making payments on the land contract. Instead, they deposited an amount equivalent to the monthly payments in an escrow account in the hope that such monies could be used to finance a clean-up of the property.

On March 14, 1989, Bogle informed plaintiffs that she was accelerating the payments due under the land contract.

Without invitation, in August of 1990, Richard Donahey tendered quit claim deeds to Bogle in an effort to surrender any and all interests he had in the property. Bogle did not assent to the delivery of the deeds. Richard Donahey knew that the grantee, Bogle, did not assent to the delivery of the quit claim deeds.

After Richard Donahey's attempt to convey his interest in the property to Bogle by way of quit claim deed, he assumed that the land contract no longer imposed a duty on him to make monthly payments and to pay for insurance and utilities. As a result, in October of 1990, Richard Donahey ceased depositing monthly payments in escrow, stopped insurance payments, stopped utility payments, and abandoned the property.

In November of 1989, the Donaheys filed their complaint. Judge Harvey, the judge to whom this case was originally assigned, partially granted Bogle's motion to dismiss all of the claims in the Donaheys' complaint, leaving only the CERCLA claim. Prior to trial, this Court denied the Donaheys' motion to reinstate their rescission claim and denied Bogle's emergency motion for declaratory relief.

CONCLUSIONS OF LAW AND DISCUSSION

I. Land Contract Claims[5]

In his complaint, Richard Donahey claims that because

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[5] The Court considers the land contract issues first because they impact the Courts subsequent analysis of the parties' CERCLA claims, specifically the determination of the current owner under CERCLA's liability provision found at 42 U.S.C. § 9607(a)(1).

he is merely a land contract vendee holding only an equitable interest in the land, he does not hold legal title to the property and, therefore, cannot be the current owner of the property. Furthermore, Richard Donahey contends that whatever ownership interest he held in the land by virtue of the land contract was terminated when he delivered quit claim deeds to Bogle.

Bogle alleges that although she holds legal title as the land contract vendor, she holds such merely as security on the debt and, therefore, cannot be considered the current owner of the property. With respect to Richard Donahey's tender of the quit claim deeds, Bogle argues that no interest in the property passed to her because she never accepted the deeds. Additionally, in her counterclaim, Bogle argues that the Donaheys breached the land contract by halting payments on the land contract in July of 1987. Bogle further claims that as a result of plaintiffs' breach of contract, she rightfully accelerated the payments on the land contract in March of 1989. Bogle claims that she is entitled to specific performance of the land contract and recovery of the accelerated amount due, $104,499.00. Bogle also claims that the Donaheys must accept a deed to the property.

A. The Land Contract

The land contract executed by Bogle and Richard Donahey is unambiguous and clearly states each party's rights and obligations. Under the land contract, Donahey was obligated to make monthly installment payments of $980.31 for ten years. Upon receiving all payments, defendant-Bogle was obligated to tender a "good and sufficient" warranty deed free from all encumbrances, except those listed in the land

contract. The land contract further provides that Richard Donahey was to pay all taxes and was to insure the building on the premises. The agreement bears Richard Donahey's acknowledgment that he examined the title commitment and was satisfied with the marketability of the property. The agreement also indicates that he "examined the . . . premises . . . " The land contract provides at paragraph 2(g) that Bogle's retention of title to the property operates as a security interest. The land contract also provides Bogle with two rights in the event of a default: (1) the right to forfeit the contract; and (2) the right to accelerate the balance owed and foreclose in equity. Michigan common law provides additional options.

Generally, if a land contract vendee defaults on contractual obligations, the vendor has various common law remedies available to her. As stated in Gruskin v. Fisher, 70 Mich. App. 117, 124-25 (1976), rev'd on other grounds, 405 Mich. 51 (1979),

> [a] dozen remedies traditionally have been available, and some were or are still available in Michigan, to a vendor under a defaulted land contract. Those remedies include action for breach of contract, ejectment, eviction, foreclosure rescission, self-help, peaceful repossession, suit for purchase money, specific performance, summary proceedings and action to quiet title.

A land contract vendor also has the right to accelerate payments upon a breach or anticipatory breach of a land contract by a vendee. Carpenter v. Smith, 147 Mich. App. 560, 564-65 (1985). This common law right was not

impaired or diminished in the land contract.

B. Legal Effect of Delivery of Quitclaim Deeds

It is well settled law that a grantor cannot convey an interest in realty without the assent of the grantee. Gibson v. Diamond, 281 Mich. 137 (1937). Bogle never accepted the deeds, and Richard Donahey knew that Bogle did not assent to delivery of the quit claim deeds. Bogle's refusal to assent to the transfer effectively blocked any conveyance of an interest in the property to her. As a result, Richard Donahey's actions did not upset the status quo. The conveyance of quit claim deeds was a legal nullity.

C. Ownership of the Property

In determining legal ownership of the land, the Court must look to the position of the parties effectuated by the execution of the land contract alone--irrespective of Richard Donahey's attempt to convey his interest in the land by serving quit claim deeds on Bogle. In this regard, it is clear that Richard Donahey held an equitable interest in the property and that Bogle, as land contract vendor, held legal title as security for repayment of the purchase price.

According to Michigan law, a land contract vendor is not considered a "property owner," but rather is analogized to a mortgagee who holds title to property only to ensure payment of a debt. In Gilford v. Watkins, 342 Mich. 632 (1955), the Michigan Supreme Court held that a land contract vendor, such as Bogle, retains legal title only as security for the purchase price. After execution of the land contract, all other rights of ownership pass to the vendee. Gilford, 342

Mich. at 637. Under Michigan law, after she entered into the land contract, Bogle could not be considered the owner of the property.

Richard Donahey is the current owner of the property. Under the terms of the contract, Richard Donahey has the right of possession and the right to secure profits. As discussed below, under CERCLA, Bogle is not the owner of the property. Thus, by necessary implication, Richard Donahey, as the land contract vendee, and under the explicit provisions of the land contract, must be considered the current owner of the property.

D. Party in Breach

Richard Donahey contends that because he no longer held an interest in the property following service of the quit claim deeds, he was no longer obligated to make monthly payments for which the parties contracted.[6] Bogle contends that because Richard Donahey failed to effectively convey his interest in the land to her, Richard Donahey's status as a vendee under the land contract continued, and she therefore remained entitled to payments in monthly installments, as specified in the land contract. Because the Court has determined that Richard Donahey's attempted conveyance was a legal nullity, Richard Donahey continues to have an interest in the property as a vendee and is obligated to make the agreed upon payments in monthly installments.

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[6] The perception that they were no longer obligated to perform under the terms of the land contract is evidenced by the correspondence sent by Donaheys' counsel to Bogle.

Thus, the Court concludes that Richard Donahey's refusal to perform according to the terms of the land contract--manifest in his refusal to make the monthly payments--constituted a breach of contract for which he is liable. Because Bogle rightfully accelerated payments due under the contract in response to Richard Donahey's breach of contract, Donahey must pay Bogle the entire outstanding debt.

Richard Donahey contends that Bogle's acceleration of the debt upon his refusal to make further payments constituted an attempt to initiate a forfeiture proceeding, which has the effect of returning full ownership rights to the party who initiated the forfeiture. As stated above, Bogle merely exercised her common law right to accelerate the payments due under the contract. She did not attempt to forfeit the contract and repossess the property or to foreclose in equity. Therefore, Donahey's argument fails.

E. Availability of Specific Performance

Bogle seeks specific performance. While a vendor seeking specific performance must tender a deed to the vendee, Bradway v. Netzorg, 298 Mich. 198 (1941), an anticipatory repudiation eliminates the need to tender the deed. Robinson v. Grosse Pointe Shores Realty Co., 281 Mich. 184 (1937) (tender of deed is not a prerequisite to an action for specific performance when the vendee attempts to rescind the contract, attempts to recover payments made, and tenders a quitclaim deed). Under the doctrine of anticipatory breach, if a party to a contract, before performance is due, unequivocally declares his intent not to perform, the innocent party has the option to sue immediately for breach of contract or to wait until .the time of performance to do so. Jackson v.

American. Can Co., Inc., 485 F. Supp. 370 (W.D. Mich. 1980); Brauer v. Hobbs, 151 Mich. App. 769 (1986).

In July of 1987, Richard Donahey unequivocally expressed his intent not to make future payments to Bogle on the land contract. Nothing in the land contract allowed him to divert future payments to an escrow account. In this respect, Bogle was deprived of the benefit of the bargain. Donahey anticipatorily breached the land contract, which obviated Bogle's duty to tender a deed as a prerequisite to filing suit for specific performance. Accordingly, the Court finds that Bogle is entitled to specific performance of the valid land contract; and pursuant Bradway and Robinson, Richard Donahey must accept a deed to the property according to the terms of the contract.

Donahey argues that Bogle cannot deliver a deed in conformity with the provisions of the land contract. The land contract requires Bogle to deliver a warranty deed free of all encumbrances except for those listed in the contract. Richard Donahey argues that the environmental contamination and/or the consequent diminution of value of the property constitutes an encumbrance precluding delivery of an valid warranty deed.

An encumbrance is a burden upon title. Simons v. Diamond Match Co., 159 Mich. 241, 247 (1909) (an encumbrance is "every right to or interest in the land granted, to the diminution of the value of the land . . ."); Madhaven v. Sucher, 105 Mich. App. 284 (1981). The mere diminution of value is not enough to constitute an encumbrance. Furthermore, environmental contamination does not affect title to the land and therefore cannot be considered an encumbrance. Thus, plaintiffs argument must fail. The Court holds that Bogle is able to convey title free of encumbrances

as required under the land contract.[7]

II. CERCLA Claims

The following CERCLA claims for costs have been asserted: (1) the Donaheys' claims against all defendants for costs and contribution under 42 U.S.C. §§ 9607(a) and 9613(f)(1), and for declaratory relief under § 9613(g)(2); (2) Bogle's counterclaim against the Donaheys for response costs (i.e., attorney fees) under § 9607(a) and for contribution under § 9613(f); and (3) Bogle's crossclaims against St. Clair and Livingstone for contribution under § 9613(f). These claims share common legal and factual findings. Accordingly, the Court, below, organizes its analysis around the common issues presented by all the claims rather than around the particular claim asserted. Because all the rights to the property belong to the Donaheys, they are the owners of

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[7] By operation of law, the United States reserved the right to any uranium and thorium on the property. However, the claim has been statutorily released. 42 U.S.C. § 2098(b). As a result, plaintiffs cannot claim that the United States has an interest in the property that precludes delivery of a deed free from encumbrances.

Plaintiff also raised the issue of a lien against the property arising from the presence of hazardous wastes. Plaintiffs argued that a statutory lien arose by virtue of "any expenditures made by the State of Michigan from the hazardous waste service fund; such expenditures give rise to a lien against the property, and against Counter-Plaintiff as its owner, pursuant to M.C.L.A. 299.543." Plaintiffs Amended Reply to Defendants Counterclaim, at p.7. Plaintiffs failed to substantiate such a claim at trial. In fact, plaintiffs failed to prove the existence of any encumbrance precluding tender of a good and sufficient warranty deed.

the property.

A. Ownership of the Property under CERCLA

As a threshold matter, it is necessary to determine the legal ownership of the property at issue. Under CERCLA, one holding indicia of ownership only to secure payment of a debt falls outside the § 9607(a)(1) definition of a current owner. 42 U.S.C. § 9601(20)(A)(iii); United States v. Nicolet, Inc., 712 F. Supp. 1193, 1204-05 (E.D. Pa. 1989). In this case, as a land contract vendor--holding legal title under Michigan law only to secure a debt--Bogle is not a current owner under § 9607(a)(1). Accordingly, under both Michigan common law and CERCLA, Bogle is not the current owner of the property.

B. Statutory Background

CERCLA's liability provision has its genesis in Congress' desire to craft "a comprehensive response to the problems of hazardous waste," (United States v. Bliss, 667 F. Supp. 1298, 1304 (E.D. Mo. 1987)), and to provide "an array of mechanisms to combat the increasingly serious problem of hazardous substance releases." United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), cert. denied, 109 s. Ct. 3156 (1989) (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1078 (lst Cir. 1986)). One of CERCLA's general purposes is "to ensure, so far as possible, that the persons responsible for the creation of hazardous waste sites be liable for the response costs in cleaning them up." United States v. Northeastern Pharmaceutical and Chemical Co., Inc. ("NEPACCO"), 579

F. Supp. 823, 848 (W.D. Mo. 1984), aff'd in part, rev'd in part on other grounds, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Congress wished to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions," S. Rep. No. 848, 96th Cong., 2d Sess. at 13, reprinted in 1 Legis. Hist. at 320, and that

> society should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner, or operator who has profited or otherwise benefitted from commerce involving these substances and now wishes to be insulated from any continuing responsibilities from the present hazards to society that have been created.[8]

To this end, Congress designed a very broad reaching liability scheme under CERCLA.

C. Prima Facie Case for Recovery of Costs

To recover response costs under § 9607 of CERCLA, a private party must prove that (1) the defendant(s) falls within one or more of the categories of "covered persons" under § 9607(a)(1)-(4); (2) a release or threatened release of hazardous substances occurred on the subject site; (3) the release or threatened release caused the party to incur costs; (4) such costs were necessary costs of response; and (5) the

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[8] Id., reprinted in 1 Legis. Hist. at 98.

party's response actions were consistent with the national contingency plan ("NCP"). Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1278-79 (D. Del. 1987), aff'd 851 F.2d 643 (3d Cir. 1988).[9]

Bogle claims that Donaheys' action is barred by the equitable doctrine of unclean hands and caveat emptor. Bogle also argues that Richard Donahey assumed the risk that hazardous materials had been released on the property. Furthermore, Bogle contends that she did not own the property when hazardous substances were disposed of there. All of the defendants argue that the costs incurred by the Donaheys were neither necessary nor consistent with the NCP.

1. Liability

Under CERCLA, the group of potentially responsible parties ("PRPs") represents a broad class. Liability under CERCLA is carefully prescribed in a statutory scheme found at 42 U.S.C. § 9607. Section 9607 states clearly the categories of PRPs, the circumstances under which they will be held liable for response costs, and the limited nature of defense available to defendants in cost recovery actions. The relevant statutory section provides:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

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[9] All parties agree and it is clear from the facts that the property at issue contains hazardous substances as defined by CERCLA.

(1) the owner and operator of a vessel or a facility,

(2) any person[,] who at the time of disposal of any hazardous substance[,] owned or operated any facility at which such hazardous substance were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substance for transport to disposal or treatment facilities or sites selected by such person, form which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for–

* * * *

(B) any . . . necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Essentially, liability under § 9607 extends to four classes of persons:[10] (1) the current owner or operator of a facility at which there is a release or threatened release of a hazardous substance; (2) the person who owned or operated the facility at the time of a hazardous substance disposal; (3) the persons who arranged for the treatment or disposal of a hazardous substance at the facility; and (4) the persons who transported hazardous substances to the facility. Section 9607 imposes strict liability--that is, without regard to fault--on a liable party. I.V. Peters & Co. v. EPA, 767 F.2d 263, 266 (6th Cir. 1985). Liability is joint and several when the environmental harm is indivisible and is proportionate when the harm is divisible. United States v. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989). Liable parties are given only limited statutory defenses. 42 U.S.C. § 9607(a), (b).

In this case, the harm to the property is indivisible. The land has been defiled by the parties' protracted and habitual waste disposal practices and neglect. It is defendants' contention that the Donaheys increased the volume of hazardous substances on the property by mixing non-hazardous materials with hazardous materials in the large lagoon, thus rendering the environmental harm to the property divisible according to pre- and post-Donahey site activities.

Contrary to the defendants' allegations, the Donaheys are not responsible for distinct aspects of the environmental

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[10] Under § 9601(21), a "person" is "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a state, or any interstate body." All of the parties in this case--individuals and a corporation--are "persons" under CERCLA.

harm to the property. The Court notes that the Donaheys did not exacerbate the condition of the land by translocating the wastes from the pits to the large lagoon--because all of the property, both surficially and subterraneously, was tainted by hazardous wastes (i.e., as mentioned above--toluene, xylene, styrene, phenol etc.). Thus, when the Donaheys mixed the surficial materials with the pit materials, they only combined substances that were already contaminated.

a) The Donaheys -

As noted above, Richard Donahey is the current legal owner of the site. Therefore, under § 9607, Richard Donahey is jointly and severally liable for all the costs of clean-up.[11]

b) St. Clair

Donaheys claim that St. Clair is liable for response costs under § 9607(a)(2) because it was an owner and operator of a facility at which hazardous substances were disposed, and under § 9607(a)(3) as a transporter.

St. Clair operated the site at the time waste were disposed of. It is clear that St. Clair had an ongoing policy of dumping barrels of hazardous waste products onto its industrial land as a method of waste disposal. It is also clear,

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[11] Patricia Donahey is not a current owner of the property; she deeded her interest in the property to Richard Donahey in 1988. As an interim owner, Patricia Donahey does not come within the definition of a liable party under § 9607(a). Thus, of the Donaheys, only Richard is jointly and severally liable under CERCLA.

considering the totality of the circumstances and all of the testimony adduced at trial, that St. Clair buried barrels and drums of hazardous waste products on the property. Under 9607(a)(2), St. Clair is jointly and severally liable as an owner or operator.

St. Clair is not liable as a transporter of hazardous substances. Under 9607(a)(3), a person must transport or arrange for the transport of hazardous substances to a facility owned by another. In this case, the evidence indicates that St. Clair only transported or arranged for transport to self-owned facilities; thus, St. Clair escapes liability under 9607(a)(3).

c) Livingstone

Donaheys next claim that Livingstone--as an operator at the time of disposal under § 9607(a)(2) and as an individual arranging for the transport of hazardous substances under § 9607(a)(3)--is liable for clean-up costs. The Donaheys' assertion of operator liability with respect to Livingstone does not rely on a theory of piercing the corporate veil; rather, the Donaheys maintain that Livingstone--despite his apparently limited status as a shareholder--exercised direct control over the waste management activities of St. Clair, and that therefore he is directly liable as an operator.

Livingstone correctly argues that there is no evidence that he arranged for the disposal of hazardous substances as defined under 9607(a)(3). Livingstone also argues that his status alone as sole shareholder and officer/director of St. Clair does not confer liability for response costs under 9607(a)(2). The Court agrees.

A stockholder, director, or officer may be personally liable under § 9607(a)(2) of CERCLA in situations where it

is shown that the individual personally participated in the wrongful conduct of the corporation. State of New York v. Shore Realty Corp.,759 F.2d 1032 (2d Cir. 1985); United States v. Conservation Chemical Co., 628 F. Supp. 391 (W.D. Mo. 1985).

In this case, there is no credible evidence that Livingstone personally participated in the waste disposal practices of St. Clair. No witness testified that Livingstone gave explicit or implicit instructions to dispose of wastes in a specific manner. The testimony at trial clearly indicated that Livingstone personally participated in only the financial aspects of St. Clair's operations, and that the day to day affairs, including waste disposal practices , were handled by managers and supervisors who did not need approval from Livingstone to execute their duties. While it is true that Livingstone had the authority to control waste disposal practices,[12] he never exercised such authority; it was delegated

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[12] The Donaheys and Bogle argue that Livingstone is liable under the test articulated in United States v. Thomas Solvent Co., 727 F. Supp. 1532 (W.D. Mich. 1989). In Thomas, the court fashioned a two part test for determining the personal liability of a corporate director under CERCLA: to hold a corporate officer personally liable under CERCLA for the harmful waste disposal practices of the corporation, the court must find that (1) the corporate officer had the authority to direct waste disposal practices, and that (2) he either acted intentionally or negligently to produce the environmental harm. The Thomas test marks the broadest reading of the term "operator," but it reaches beyond the intent underlying CERCLA by imposing what amounts to a simple negligence standard that is not indicated in the statutory scheme, nor supported by the structure or history of CERCLA. Therefore, the Court rejects the Thomas test as excessively broad and ill-founded.

to others. Livingstone is not liable under § 9607(a)(2).

There is also no evidence that Livingstone personally arranged for the disposal of St. Clair's industrial waste products. Former St. Clair employees Nuss and Aldrich provided uncontroverted testimony that their participation as employees in St. Clair's waste disposal practices on the property was not under the direction of Livingstone. Both former employees testified that managers and supervisors directed their activities and that they had no reason to believe that Livingstone was involved at all. Thus, Livingstone is not liable under § 9607(a)(3) as a person who arranged for the treatment or disposal of St. Clair's waste materials.

d) Bogle

Donaheys also claim that Bogle is liable for their response costs because she allegedly owned the property when hazardous substances were disposed of. This claim against Bogle relies on 42 U.S.C. § 9607(a)(2), which provides that "any person who[,] at the time of disposal of any hazardous substances[,] owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for" response costs. Relying on a witness' (Joel Hunt) interpretation of aerial photographs, Bogle counters by arguing that the disposal of the hazardous waste and barrels in the underground pits occurred before she acquired legal title to the property.

Clearly, Bogle owned the property when hazardous substances were disposed of on the property. Hunt's testimony regarding the creation of the underground pits was not credible. Based upon his reliance on the geological "law

of superposition,"[13] Hunt testified that aerial photographs revealed that the underground pits were created prior to March or May of 1961. Bogle acquired title in August of 1961. Such testimony ignores important facts. For example, the known area of the underground pits--as revealed on aerial photos and as extracted from the testimony of Halfen and others--did not correspond with the area in which Hunt claimed the pits were created. Simply put, Hunt's opinion was not supported by a fair interpretation of the aerial photographs. Also, Bogle has ignored the testimony of Aldrich and Nuss to the effect that St. Clair dumped hazardous substances, and transported and abandoned barrels to the property throughout the 1970s. That fact alone would sustain a finding that Bogle is liable under § 9607(a)(2) as an owner at the time of disposal of hazardous substances. The Court concludes that Bogle did own the property when hazardous substances, including the material in the pits, were disposed of on the property; therefore, Bogle is jointly and

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[13] The Geologic Law of Superposition, as Hunt characterized it, provides that when natural or man-made deposits are layered, the most recent deposit constitutes the top layer--not an altogether remarkable concept.

Hunt was asked on direct examination when the pits were created. Hunt testified that the aerial photo of the property, taken in 1961 before Bogle owned the property, showed "water or materials" layered above what Hunt referred to as the pit area, which Hunt claimed was under the water or materials. Based on this observation and the law of superposition, Hunt concluded that the pit area predated the photo. This conclusion assumes that the pits had already been created or layered prior to 1961. The conclusion, therefore, begs the question.

severally liable under § 9607(a)(2).

2. Defenses to Liability

a) The Donaheys

Richard Donahey argues that pursuant to § 9607(b)(3) of CERCLA, he is entitled to assert a "third party" defense. Section 9607(b) and (b)(3), taken together, state:

> [t]here shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by --
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> (3) an act or omission of a third party other than . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

The Court is persuaded that Richard Donahey may not properly avail himself of the third party defense delineated in § 9607(b)(3). While it is true that a third party without any relevant contractual relationship with the Donaheys (i.e., St. Clair and/or Bogle) was directly responsible for the release and/or threat of release of hazardous substances on the property, Richard Donahey's actions do not fall within the purview of § 9607(b)(3) because he did not exercise due care with respect to the hazardous wastes and did not take precautions against the consequences that could foreseeably result from the acts or omissions of the third party.

Richard Donahey did not use due care in the handling of the wastes on the property. He disrupted the settled wastes by transferring them to the large lagoon. By indicating that the property was insulated from the ground water by a 100 feet thick layer of clay, the E&E report belies his claim that there was a need to consolidate and "to stabilize," as Halfen claims, the wastes in the large lagoon. It is not persuasive that Halfen claims to have been ignorant of the E&E report when it was completed well before he executed his planned clean-up. Nonetheless, if Halfen was truly ignorant of the E&E report before executing the clean-up, then his effort (on behalf of Richard Donahey) certainly lacked the due care required under § 9607(b)(3). More broadly, Richard Donahey's failure to comply with the NCP and his failure to demonstrate the necessity of his activities on the property constitute a lack of due care under § 9607(b)(3).

In addition to his lack of due care, Richard Donahey failed to take precautions against the consequences that could foreseeably result from the acts or omissions of the third party. With a heavy and dense concentration of hazardous wastes present, the property presented the potential for great

harm to the ecosystem through leaching-and run-off. Richard Donahey did nothing to guard against these possibilities. Instead, he consolidated all of the wastes in an above ground pile, thus exposing the wastes to the local fauna and also creating an attractive nuisance. Aside from allowing environmental authorities to conduct some limited testing, Richard Donahey did nothing constructive to prevent further environmental harm or to guard against foreseeable consequences. Had Richard Donahey been concerned with the potential harm to the local area, he would have complied with MDNR requests to perform a hydrogeological evaluation and to dispose of roughly 125 drums (some with hardened rubber material) in accordance with the Michigan Solid Waste Management Act. In addition, had Richard Donahey been concerned with the consequences of the potential harm to the environment, he would not have abandoned the property after making a clearly futile attempt to quit claim his interest to a knowingly unreceptive Bogle. Such conduct can hardly provide the basis for applying the third party defense under § 9607(b)(3).

In sum, after considering all relevant facts and circumstances, the Court holds that because Richard Donahey failed to use due care in his handling of the hazardous wastes on the property and failed to guard against foreseeable consequences, the third party defense under § 9607(b)(3) is not available to him. [14]

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[14] The Donaheys second alleged defense is technically not a defense, but rather a factually based argument against liability. The Donaheys argue that because they were merely interim owners--from 1982 to 1990--they do not fall within the four classes of potentially liable parties in § 9607(a). As the Court has noted

b) Bogle

Bogle also claims that the third party defense pursuant to § 9607(b)(3) absolves her of liability under § 9607(a). For reasons even more compelling than those applicable to Richard Donahey's assertion of a third party defense, Bogle's alleged third party defense must fail.

Bogle did not use due care with respect to the hazardous wastes that were discharged onto the property. Under Bogle's lease agreements with St. Clair, she specifically reserved the right to inspect the property. She never did. Essentially, Bogle was an absentee landlord who failed to adequately monitor the use of the property, even after City of Marysville officials insisted that St. Clair stop its practice of incinerating organic wastes on the property. In addition, like the Donaheys, Bogle did not comply with MDNR requests to perform a hydrogeological survey and to remove barrels.

It is clear that Bogle failed to take precautions against St. Clair's waste disposal practices and failed to take precautions against the foreseeable consequences of St. Clair's actions.

In sum, because Bogle did not use due care and did not take precautions against the foreseeable consequences of St. Clair's actions, she cannot successful assert the third party defense under § 9607(b)(3).

Bogle has also asserted the defenses of unclean hands, caveat emptor, and assumption of risk. Her claims do not

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above, the Donaheys are the current owners of the property; therefore, the "interim owner" claim lacks merit.

stand scrutiny. CERCLA's liability provision limits available defenses to only those stated in § 9607(b)(3): an act of God; an act of war; and a third party defense (or a combination of the three). Although the concepts of unclean hands, caveat emptor, and assumption of risk may be appropriate in apportioning liability under § 9613(g), they are not defenses to liability under CERCLA.

3. Release

A "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment." 42 U.S.C. § 9601(22). Nuss and Aldrich, former St. Clair employees, testified that St. Clair's practice of dumping occurred as early as 1955 and occurred specifically at the subject property in the early 1970s. Furthermore, the expert testimony established that the hazardous materials at the property continue to leach into top soil. Thus, the Court concludes that a "release" occurred, and that a threat of release continues at the property.

4. Nature of the Response Costs

Both the Donaheys and Bogle claim that attorney fees associated with the response action and incurred in the prosecution of their private actions for contribution are recoverable "response costs" within the meaning of CERCLA. The Court disagrees.

The American Rule provides that each party bears the burden of its own legal costs, and that "absent explicit congressional authorization, attorney fees are not recoverable

costs of litigation." Runyah v. McCrary, 427 U.S. 160, 185 (1976); Accord Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 247 (1975). Although CERCLA specifically allows the government to seek an award of attorney fees, a parallel statutory provision for private parties does not exist. The Sixth Circuit Court of Appeals has not addressed the issue of whether attorney fees incurred by a private party constitute recoverable response costs under CERCLA.

Many Courts faced with the issue have determined that in private cost recovery actions, attorney fees are not recoverable response costs. T & E Industries, Inc. v. Safety Light Corp., 680 F. Supp. 696 (D. N.J. 1988); Mesiti v. Microdot, Inc., 739 F. Supp.57 (D. N.H. 1990); Regan v. Cherry Corp., 706 F.Supp. 145 (D. R.I. 1989); In re Hemingway Transport, Inc., 108 B.R. 378 (Bankr. D. Mass. 1989).

The Eighth Circuit Court of Appeals has held to the contrary. In General Electric Co. v. Litton Business Systems, Inc., 920 F.2d 1415 (8th Cir. 1990), the court interpreted the definition of "response" in 42 U.S.C. § 9601(25) to include attorney fees. Accord Allied Towing Corp. v. Great Eastern Petroleum Corp., 642 F. Supp 1339, 1349 (E.D. Va. 1986). The court stated that because a "response" under § 9601(25) includes "enforcement" activities, recoverable response costs must include enforcement costs. The court went on to say that attorney fees incurred in the prosecution of a private action are enforcement costs, and are therefore recoverable response costs. [15]

Litton is not persuasive. The court did not explain how

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[15] CERCLA does not define "enforcement activities."

its interpretation of § 9601(25) harmonized with the longstanding American Rule regarding recovery of attorney fees. This omission is particularly important when one considers the resulting internal incongruity of CERCLA, providing explicit and unequivocal language allowing the government to seek attorney fees under § 9604(b)(1), but providing only a circumscribed textual basis, as stated in Litton, for granting the same right to private parties. [16] What is more, the holding in Litton does not consider Congress' failure to include a provision for recovery of attorney fees by private party litigants in the comprehensive amendments to CERCLA passed in 1986. See Regan v. Cherry Corp., 706 F. Supp. 145, 149 (D. R.I. 1989).

Litton presents other problems as well. If attorney fees are response costs, then to recover such costs under § 9607, a party must establish that such expenditures were consistent with the NCP, which is silent with respect to the criteria a court would employ in determining the legitimacy of attorney fees. Once again, to consider attorney fees recoverable response costs strains the statutory and regulatory language and design. This Court declines to give CERCLA such an interpretation.

While the Court is well aware of the judicial tendency to interpret CERCLA expansively in the hope of effecting its remedial goals, it nonetheless believes that such an ambitious

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[16] The inclusion of a section specifically addressing the government's ability to recover attorney fees strongly suggests that Congress was well aware of the need--given the Runyah and Alyeska rationales--to unequivocally declare a party's right to recover attorney fees under CERCLA, which they did not do for private party litigants.

effort with respect to the issue of attorney fees would be disingenuous and would denigrate settled rules of statutory interpretation and the integrity of the statutory scheme. The Court declines to invigorate the Litton court's achievement of an expansion of--rather than an interpretation of--the term "response."

Based upon the well-settled American presumption against allowing recovery of attorney fees, and based upon the lack of explicit congressional authorization for recovery of attorney fees in the statute, the Court concludes that attorney fees in private actions are not recoverable "response costs" under CERCLA. Accordingly, Donaheys' request to recover $279,366.80 in attorney fees as response costs, as a matter of law, fails. Bogle's claim for attorney fees suffers the same legal defect.

As a factual matter, Donaheys' request for attorney fees also fails. Donaheys' complaint included ten claims or theories of recovery, only one of which invoked CERCLA. After hearing a motion for summary judgment, the Honorable James Harvey, to whom this case was originally assigned, dismissed nine of the ten claims in the Donaheys' complaint, leaving only the CERCLA claim for trial. At trial, Donaheys submitted summaries of the attorney billings and the original billings, both of which failed to specify the exact type of service performed. The proofs failed to indicate whether the attorney fees were expended in defense of the CERCLA claim or the other federal statutory and state common law claims that were dismissed. The proofs did not indicate if the attorney fees were incurred in receiving counselling, prosecuting and/or defending the CERCLA claim, defending the other claims, or preparing for trial. Because the Donaheys' did not itemize the various attorney fees incurred

over time, the Court is unable to determine the exact amount incurred in the prosecution and defense of their CERCLA claim; in receiving counselling on compliance with CERCLA; and in orchestrating the legalities involved in the actual response effort. At best, then, as a factual matter, Donaheys' claim for attorney fees is speculative. [17]

5. Compliance with the NCP

Defendants contend that the response costs incurred by the Donaheys--namely the costs associated with plaintiffs' efforts in August of 1987--were neither necessary nor consistent with the NCP. The NCP can be found at 40 C.F.R. 300.61 et seq. The NCP is a compilation of rules and regulations designed to implement the federal government's

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[17] In their post-trial proposed findings of fact and conclusions of law, plaintiffs have requested a supplemental hearing following a determination of liability, at which time they plan to supplement their proofs on damages. Although in form plaintiffs have indicated that they do not want a bifurcated trial, in substance it is exactly what they are requesting. Plaintiffs request was denied at trial because, inter alia, one element of plaintiffs' prima facie case is a detailed presentation of the type, propriety, and necessity of response actions taken; thus, no finding of liability could be made in the absence of sufficient proof of damages. The Court hereby affirms its prior ruling at trial denying plaintiffs' request for a bifurcated trial.

In addition to the attorney fees and the costs associated with Halfen's activities, plaintiffs also seek to recover approximately $20,000.00 expended for the services of "consultants." Plaintiffs have not produced any evidence to support recovery for such consultant fees.

general plan or framework for guiding and managing responses to hazardous substance releases. Although the NCP was not intended to provide complex and detailed decision making criteria, 50 Fed. Reg. 47920 (Nov. 20, 1985) (preamble to NCP), it does contain guidance for private response actions. 40 C.F.R. 300.61(e)(2). The NCP incorporates all applicable federal, state, and local environmental regulations, 40 C.F.R. § 300.71(a)(4), including sections of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq., concerning treatment of hazardous wastes. For the reasons stated below, the Court concludes that Donaheys' August, 1987 actions were inconsistent with the NCP and, therefore, are not recoverable under CERCLA.

Based on the testimony of plaintiffs' expert, Lawrence Halfen, the Court concludes that the hazardous substances discovered at the property are "hazardous wastes" within the meaning of RCRA, 42 U.S.C. § 6903(5), thereby causing RCRA regulations to be incorporated into the NCP and to be applied in this case. Section 6903(5) defines a hazardous waste as a compound that may cause death or serious permanent illness, or pose a health risk when improperly stored. EPA regulations further define hazardous wastes at 40 C.F.R. § 261.31. Benzene, toluene, and xylene are variously defined under § 261.31 as "F" series hazardous wastes. It is undisputed that these chemicals were used in St. Clair's rubber manufacturing processes throughout the period in question and that they were utilized in churn-washing procedures at St. Clair. Furthermore, Halfen's testimony clearly establishes that he detected these compounds surficially and subterraneously in appreciable concentrations, leading him to the conclusion that his intended clean-up effort would

be inadequate and that instead, he would need to prepare a plan to clean-up "hazardous wastes." Indeed, Halfen's testimony was rife with references to "hazardous wastes." Accordingly, because hazardous wastes were known to exist on the property, RCRA regulations regarding the treatment of hazardous wastes are applicable to this case via incorporation into the NCP. [18]

Plaintiffs' clean-up effort did not comply with RCRA regulations. A party handling or processing hazardous wastes must obtain a RCRA permit. 40 C.F.R. § 270.1(c)(1)(ii). Plaintiffs failed to meet the permit requirement under § 270 when they allowed their agent, Halfen, to excavate the pits and consolidate the hazardous wastes into the large lagoon. Treatment and storage of hazardous wastes must be preceded

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[18] Plaintiffs have maintained, independent of the testimony of Halfen, that the property contained hazardous wastes. At paragraph 48 of plaintiffs' complaint, plaintiffs state that "[s]ome of the hazardous and dangerous substances released from the Wills Street site into the soils, and ground and surface waters are 'hazardous wastes' as defined in 42 U.S.C. Sec. 6903(5)." In their brief in support of their motion to reinstate Count XI of the complaint, dated November 27, 1990, at pp 8-9, plaintiffs claimed that

> "[s]upporting Plaintiffs' rescission argument is a record demonstrating that neither contracting party had any knowledge of the presence of a separate area on the property containing hazardous waste contamination . . . . Plaintiffs obviously did not enter into this contract with the intent to purchase a piece of property contaminated by hazardous waste pits."

by a detailed physical and chemical analysis of a representative sample. 40 C.F.R. § 264.13. Although plaintiffs' agent, Halfen, knew he was handling hazardous materials, he did not obtain the requisite analyses mandated by § 264.13. An owner or operator of a facility must secure the site against unknowing and unauthorized entry by persons and/or livestock. 40 C.F.R. § 265.14. A 24 hour surveillance system, or a fence in good repair combined with a means to control entry, constitute the two permissible methods of satisfying § 265.14. Plaintiffs' did neither. Plaintiffs' placement of a wood-slat snow fence around the consolidated pile in the large lagoon does not present any real barrier to intrusion at the property. The snow fence, even in perfect condition, could be overcome with minimal effort.[19] Hazardous wastes cannot be stored for more than 90 days without obtaining a permit or a permit waiver. 40 C.F.R. § 262.34. Plaintiffs never received a permit or a permit waiver for their storage of hazardous wastes on the property, storage that now approximates four years.

Based on all of the foregoing, it is clear that hazardous wastes are present on the property and that plaintiffs have not acted in compliance with RCRA, and hence the NCP.

Plaintiffs' actions violated other NCP provisions, separate and independent from the violation of regulations incorporated into the NCP. The NCP favors actions "necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances" and the taking of "other actions as may be necessary to prevent, minimize, or

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[19] Photographs of the snow fence show it in a dilapidated condition.

mitigate damage to the public health or welfare or the environment which may otherwise result from such release or threat of release." 40 C.F.R. 300.64. The NCP includes a list of removal actions that are appropriate in certain circumstances and that are relevant to this case:

> (1) providing fences, warning signs, or other security or site control precautions--where humans or animals have access to the release;
>
> (2) constructing drainage controls (e.g., runoff or run-on diversions)--where precipitation or run-off from other sources (e.g., flooding) may enter the release area from other areas;
>
> (3) stabilization of berms, dikes, or impoundments--where needed to maintain the integrity of the structure;
>
> (4) capping of contaminated soils or sludges--where needed to reduce migration of hazardous substances or pollutants or contaminants into soil, ground water, or air;
>
> (5) removal of contaminated soils from areas--where such removal reduces the spread of contamination;
>
> (6) removal of barrels and drums that contain or may contain hazardous substances, pollutants, or contaminants--where it will reduce the likelihood of spillage, leakage,

exposure to humans, animals, or food chain, or fire or explosion.

Plaintiffs actions did not substantially comply with the NCP requirements listed above. Plaintiffs actions, through their agent Halfen, made a bad situation worse. Plaintiffs dismantled a wire fence that surrounded the pit area, facilitating rather than impeding access to the site. After consolidation of the hazardous wastes in the large lagoon, plaintiffs erected a snow fence that provided no real barrier to entry. Plaintiffs placed "hazardous waste" stickers on the snow fence. The paper stickers have since disintegrated. Plaintiffs provided no drainage control. Stabilization of the large lagoon was only necessitated by plaintiffs' consolidation of wastes in the lagoon. According to Halfen's own calculations (see exhibit 65-B), the consolidation of the wastes in the large lagoon increased the surface area of wastes exposed to top soil by 50%.[20] The mollifying effect of covering the waste pile with a tarp and top soil is negated by the greater access to the wastes above ground as opposed to below ground in the pits. Thus, in addition to enhancing the possibility of migration into soil, the mounding of the wastes eased access and increased the chances of contact with the hazardous wastes. Also, by translocating the wastes from the pits to the large lagoon, plaintiffs spread the contamination to a relatively untainted portion of the property. Considering the fact that plaintiffs removed very little hazardous materials

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[20] According to Halfen's measurements in exhibit 65-B, the total surface area of the pits was approximately 2700 square feet; the total surface area of the large lagoon after consolidation was approximately 4000 square feet.

from the property, and that plaintiffs, according to their own admissions, knew little about the exact characteristics of the materials they were dealing with, it is impossible to say that plaintiffs' actions facilitated the goals underlying CERCLA or in any way improved the condition of the defiled property. Plaintiffs' actions on the property in August of 1987 did not comply, strictly or substantially, with the NCP. Thus, the costs incurred by plaintiff for their August 1987 activities are not recoverable under CERCLA.

Halfen testified at trial that his actions were meant to reduce the presence of an attractive nuisance on the property. Apparently it was plaintiffs' contention that underground, invisible pits--with approximately seven square feet modestly exposed in a tire track made by a backhoe weighing thousands of pounds--posed an attractive nuisance, more so than the conspicuous 1600 cubic yards of wastes piled into the large lagoon and surrounded by a three foot snow fence bearing warning stickers. Common sense belies plaintiffs' contention.

Halfen also testified that consolidation of the wastes was necessary to reduce or minimize the threat of fire allegedly created by the exposure of the flammable solvents in the pits. Halfen did not detect solvent odor emanating from the pit area until he probed the area with a long metal rod. There was no evidence that the mere discovery of solvents underground created a risk of fire. In fact, the excavating action of the backhoe released solvents into the air, agitated and disturbed the settled state of the wastes, and caused the backhoe to directly contact the wastes (increasing the likelihood that the mechanics of the backhoe or the collision of metal barrels with the backhoe would create sparks). Halfen's actions increased the risk of fire by releasing vapors, concentrating the flammable materials in one place, and

bringing the backhoe into close proximity to the flammable materials.

It is also difficult to understand exactly what made plaintiffs' actions "necessary." Halfen identified the location of the pits and could have measured the volume of the pits without excavating them. He also could have taken samples without performing a wholesale excavation of the pits. What is more, the Court does not understand how anyone could take constructive action absent a reliable analytical characterization of the materials in the pits.

The Court holds that Halfen's actions over the course of six days in August of 1987, and performed upon plaintiffs' request, were neither necessary nor consistent with the NCP. Accordingly, the Court finds that plaintiffs have failed to prove an essential element of their cause of action.

D. Declaratory Relief under § 9613(g)(2) for Future Liability

In their complaint, the Donaheys seek Declaratory Relief regarding liability for future response costs incurred. The Court holds that such relief is not available when the party seeking declaratory relief has failed to incur recoverable response costs. See Southland Corp. v. Ashland Oil, Inc., 696 F. Supp. 994, 999, 1003 (D.N.J. 1988); O'Neil v. Picillo, 682 F. Supp. 706, 730 (D.R.I. 1988), aff'd, 883 F.2d 176 (lst Cir 1989). Because the plaintiffs, have not incurred recoverable response costs, declaratory relief is not available.

CONCLUSION [21]

With respect to the land contract issues in this case, the Court finds that (1) the Donaheys breached the land contract by, inter alia, failing to make installment payments; and (2) Helen Bogle is entitled to specific performance of the land contract, and the Donaheys must accept a deed to the land.

The notion of an absentee landlord, the externalization of production costs, the demonstrated human tendency to conceal environmental defects and to evade liability--separately and collectively--provided the impetus for the passage of an austere statute like CERCLA, which in this case, has produced the following results: for all the reasons stated above, the Court holds that (1) all parties, save Seabourn S. Livingstone, are jointly and severally liable under CERCLA for the environmental contamination located in the large lagoon area of the property located at 2408 Wills; (2) the alleged response costs incurred by Bogle and the Donaheys are not recoverable under CERCLA; (3) declaratory relief is not available in this case; (4) the Donaheys are the current owners of the property at 2408 Wills, and Helen Bogle holds legal title merely to secure Donaheys' indebtedness.

The parties are hereby ORDERED to submit a joint proposed Judgment not inconsistent with this opinion by October 11, 1991.

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[21] The "conclusion" shall not be construed to limit or modify the specific findings of fact and conclusions of law contained in the body of this opinion.

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IT IS SO ORDERED

/S/_____
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX H

No. 87-CV-74771

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
December 23, 1991
NESTWOLD, CLERK

RICHARD M. DONAHEY AND PATRICIA A. DONAHEY, *Plaintiffs*	)	HON. LAWRENCE P. ZATKOFF
v.	)	**ORDER**
HELEN L. BOGLE, SEABOURN S. LIVINGSTONE, H. GORDON WOOD AND ST. CLAIR RUBBER COMPANY, a Michigan Corporation, jointly and severally, *Defendants.*	)	

/

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ORDER MODIFYING OCTOBER 1, 1991
FINDINGS OF FACT & CONCLUSIONS OF LAW

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 23rd day of December, 1991.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

This matter is before the Court on defendant-Bogle's motion to amend this Court's findings of fact and conclusions of law dated October 1, 1991.

Bogle contends that because the Court found that plaintiff-Donahey's actions at the Will Street site were neither necessary nor consistent with the national contingency plan ("NCP"), the Court should not have found Bogle jointly and severally liable under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") for the environmental contamination at issue in this case. Bogle also contends that because ownership under CERCLA § 9607(a) is determined at the time the complaint in the suit is filed, plaintiff-Patricia Donahey should be considered a current owner of the Will Street property and, hence, a covered person under CERCLA.

In its findings of fact and conclusions of law, the Court determined that plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. were jointly and severally liable for the environmental contamination of the Will Street property based on their status as "covered persons" under

§ 9607(a)--despite the fact that the plaintiffs failed to prove all the elements of their prima facie case. The Court was in error. With respect to the environmental contamination at issue in this case, the plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. are merely covered persons under CERCLA. Because the plaintiffs failed to establish all the elements of their claim, no judgment of liability against plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. can enter.

Accordingly, the Court hereby amends its October 1, 1991 findings of fact and conclusions of law such that (1) the Court's previous determination that the plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. are jointly and severally liable is hereby vacated, and (2) the Court finds that plaintiff-Richard Donahey and defendants-Bogle and -St. Clair Rubber Co. are merely covered persons under § 9607(a).

In its findings of fact and conclusions of law, the Court held that although plaintiff-Patricia Donahey owned the Will Street property when the complaint was filed, she relinquished title before trial and was not, therefore, a covered person under CERCLA. The Court rejects Bogle's claim that Patricia Donahey is a covered person under § 9607(a). Bogle relies on United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 (11th Cir. 1990) (current ownership status under § 9607(a) of CERCLA is determined when the complaint is filed). The Court declines to follow Fleet Factors for two reasons: first, the court in Fleet Factors reached its conclusion with no analysis whatsoever; second, the statute itself does not support the conclusion that "current owner" status is fixed at the moment the complaint is filed.

Bogle's remaining arguments in support of

modification are rejected.

IT IS SO ORDERED.

/s/_____
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX I

No. 87-CV-74771-DT

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

FILED
December 23, 1991
NESTWOLD, CLERK

RICHARD M. DONAHEY AND PATRICIA A. DONAHEY, *Plaintiffs and Counter-Defendants*	)	HON. LAWRENCE P. ZATKOFF
v.	)	**JUDGMENT**
HELEN L. BOGLE, *Defendant and Counter-Plaintiff*, AND SEABOURN S. LIVINGSTONE, H. GORDON WOOD AND ST. CLAIR RUBBER COMPANY, a Michigan Corporation, jointly and severally, *Defendants*.	)	

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AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 23rd day of December, 1991.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

The Court has made and filed its Findings of Fact and Conclusions of Law in this case on October 1, 1991, as modified by this Court's December 23, 1991 Order, as summarized below:

(1) Plaintiff-Richard M. Donahey, defendant-Helen L. Bogle, and defendant-St. Clair Rubber Company, a Michigan corporation, are covered persons under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq., for the environmental contamination at issue in this case and discussed in this Court's October 1, 1991 Findings of Fact and Conclusions of Law;

(2) with respect to the above referenced environmental contamination, neither plaintiff-Patricia Donahey nor defendant-Seabourn S. Livingstone are covered persons under CERCLA;

(3) none of the parties has incurred any recoverable response costs under CERCLA;

(4) plaintiffs' request for declaratory relief for future liability pursuant to 42 U.S.C. § 9613(g)(2) is denied;

(5) Richard M. Donahey is the current owner of the Property at 2408 Will Street, and Helen L. Bogle holds legal title merely to secure the indebtedness of Richard M. Donahey to her pursuant to a land contract entered into between the parties ("the land contract");

(6) Richard M. Donahey shall specifically perform the land contract within 10 days of the entry of this Judgment by paying (1) $69,496.49 being the principal amount due as of June 8, 1987 when Richard M. Donahey made his last payment under the land contract to Helen L. Bogle, together with (2) interest on payments due pursuant to the land contract calculated in accordance with the land contract rate of 11% per annum, running from June 8, 1987 until March 14, 1989 being the date of filing of Helen L. Bogle's Counterclaim, together with (3) pre-Judgment interest pursuant to M.C.L. 600.6013(5) from March 14, 1989 to the date of this Judgment, together with (4) Judgment interest thereafter pursuant to 28 U.S.C. § 1961 from the date of this Judgment until the date of payment;

and hereby ORDERS, ADJUDGES and DECREES that

(A) with respect to Richard and Patricia Donaheys' CERCLA claims, Judgment of No Cause for Action and No Cause for Declaratory Relief including declaratory relief for future liability, is granted in

favor of St. Clair Rubber Company, Helen L. Bogle, and Seabourn S. Livingstone against Richard M. and Patricia A. Donahey; and

(B) with respect to Helen Bogle's counterclaim under CERCLA, Judgment of No Cause for Action is granted in favor of St. Clair Rubber, Seabourn S. Livingstone, Richard Donahey and Patricia A. Donahey against Helen L. Bogle; and

(C) with respect to Helen Bogle's counterclaim for breach of contract under Michigan Common Law, Judgment in the amount stated above is granted in favor of Helen L. Bogle against Richard M. Donahey, together with interest; and

(D) with respect to Helen Bogle's counterclaim for specific performance under Michigan Common Law, Judgment for specific performance is granted in favor of Helen L. Bogle against Richard M. Donahey, by which Richard M. Donahey is ORDERED to accept title to the property, 2408 Wills, Marysville, St. Clair County, Michigan, as and when presented and, upon failure of Richard Donahey to accept title, Helen L. Bogle is granted the right to present this JUDGMENT as Deed of Ownership of Richard M. Donahey to the property, and State of Michigan, County of St. Clair and City of Marysville officials are directed to recognize this JUDGMENT as Deed, according it all rights and privileges, including recordation.

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IT IS SO ORDERED.

/s/_____
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX J

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

42 U.S.C. § 9601. Definitions
[CERCLA § 101]

* * * * *

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

* * * * *

§ 9607. Liability
[CERCLA § 107]

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section –

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

* * * * *

§ 9613. Civil proceedings
[CERCLA § 113]

* * * * *

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

* * * * *

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

Opposition Brief Unavailable at Time of Filming